

**THE DIGITAL MEDIA CONSUMERS' RIGHTS ACT
OF 2003**

HEARING
BEFORE THE
SUBCOMMITTEE ON
COMMERCE, TRADE, AND CONSUMER PROTECTION
OF THE
COMMITTEE ON ENERGY AND
COMMERCE
HOUSE OF REPRESENTATIVES
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C O N T E N T S

	Page
Testimony of:	
Boucher, Hon. Rick, a Representative in Congress from the State of Virginia	10
Doolittle, Hon. John T., a Representative in Congress from the State of California	13
Holleyman, Robert W., President and Chief Executive Officer, Business Software Alliance	34
Jaszi, Peter, Professor of Law, Washington College of Law, American University	85
Lessig, Lawrence, Professor of Law, Stanford Law School	15
Moore, Robert, Chief Executive Officer, 321 Studios	110
Murray, Chris, Legislative Counsel, Consumers Union with Gigi B. Sohn, President, Public Knowledge	99
Nisbet, Miriam M., Legislative Counsel, American Library Association	41
Rose, Debra, Senior Legislative Counsel, the Entertainment Software Association	93
Shapiro, Gary J., President and Chief Executive Officer, Consumer Electronics Association	22
Sherman, Cary, President, Recording Industry Association of America	80
Swift, Hon. Al, Colling Murphy	38
Valenti, Jack, President and Chief Executive Officer, Motion Picture Association of America	29
Additional material submitted for the record:	
Entertainment Software Association, response for the record	123
Holleyman, Robert W., President and Chief Executive Officer, Business Software Alliance, response for the record	125
Jaszi, Peter, et al, letter dated June 10, 2004, enclosing response for the record	139
Lessig, Lawrence, Professor of Law, Stanford Law School, letter dated June 11, 2004, enclosing response for the record	129
McCormick, Walter B., Jr., President and Chief Executive Officer, United States Telecom Association, prepared statement of	127
321 Studios, response for the record	143

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WEDNESDAY, MAY 12, 2004

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON COMMERCE, TRADE,
AND CONSUMER PROTECTION,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2123, Rayburn House Office Building, Hon. Cliff Stearns (chairman) presiding.

Members present: Representatives Stearns, Upton, Whitfield, Shimkus, Shadegg, Radanovich, Pitts, Bono, Terry, Ferguson, Issa, Otter, Barton (ex officio), Schakowsky, Gonzalez, Towns, Rush, Stupak, Green, McCarthy, Strickland, and Davis.

Also present: Representative Boucher.

Staff present: David Cavicke, majority counsel; Chris Leahy, majority counsel and policy coordinator; Shannon Jacquot, majority counsel; Brian McCullough, majority professional staff; William Carty, legislative clerk; Jonathan Cordone, minority counsel; and Ashley Groesbeck, minority staff assistant.

Mr. STEARNS. Good morning, everybody. I'm pleased to welcome all of you to the Commerce, Trade, and Consumer Protection Subcommittee hearing on H.R. 107, the Digital media Consumers' Rights Act of 2003.

We are particularly grateful to our guests from the content and technology communities, consumer groups, academic groups for allowing us to present a balanced hearing on the issues and the challenges facing the copyright field in an era of rapid technological innovation.

I can't remember when this subcommittee last had three panels of so many distinguished experts. So obviously we're anticipating a very interesting, insightful examination of these issues and they're very important.

In yesterday's analog world, the centuries old concept of "fair use" established that some previously unauthorized use of copyrighted works by individuals should be allowed because their value to society outweighs the costs to the copyright holder. This is based on the belief that not all copying should be banned. The Copyright Act, which codified the "fair use" doctrine, specifically allowed the use of copyrighted material for "purposes such as criticism, comment, news reporting, teaching, scholarship, or research" while it strictly prohibited all unauthorized commercial sales of a copyrighted material. In short, the history of "fair use" has been a his-

tory of maintaining the balance between the public interest in free speech with the rights of copyright holders to obviously protect their works.

In today's digital world, the explosive growth of digital media, the universal nature of the internet as a distribution network, and the ease of flawless digital reproduction, have made the time-tested "fair use" doctrine much more nuanced. Daily computer tasks such as browsing, linking, and viewing streaming audio and video have challenged this doctrine in ways that we could not have imagined when we passed the 1996 Telcom Act. The issues created by just making a "backup" copy of a CD or DVD have made the cases posed by the player piano, photocopying machine, and videocassette recorder seem simple by comparison. Even so, the balance between the consumer's need for free and open information and the rights of the copyright holders continues to be the dynamic, even in a constantly changing digital world.

My colleagues, to help address these new complexities and the new and novel threats to copyrighted works, the Congress passed the Digital Millennium Copyright Act, DMCA, in 1998. In particular, the DMCA created civil and criminal penalties for individuals who circumvent encryption or other technological anti-tampering measures known as digital rights management or "DRM." The DMCA also extends these anti-tampering prohibitions to those who seek to sell or trade in technologies designed to break encryption technology or circumvent it. Basically, the DMCA makes picking the lock or finding a way through the back door illegal to protect the contents of the house, regardless of whether the intruder has a right to use this content. The DMCA also contains certain exceptions.

In order to further refine the DMCA and maintain a fair and balanced approach to copyright protection, our colleague, Mr. Boucher from Virginia, has introduced H.R. 107, "The Digital Media Consumers' Rights Act of 2003." Mr. Boucher's bill would establish a "fair use" defense for circumvention and allow consumers, in effect, to unlock encryption or DRM technology to make "fair use" of the copyrighted work.

Supporters of H.R. 107 point out that the Digital Millennium Copyright Act prevents consumers from making fair use of encrypted materials. As a practical matter this means that a consumer cannot make a copy of a DVD for his or her own "fair use."

In contrast now, those opposed to H.R. 107 contend that without the prohibition against breaking encryption, the protection for copyrighted works under current law would be weakened. They also hold that allowing persons the ability to "unlock" anti-tampering technology, encryption, and access the copyrighted material would quickly spur piracy gadgets and technology that would quickly devalue their product and put them frankly out of business. In their words, buying a DVD doesn't mean, "buy one and get as many as you like free."

As we have seen in trade hearings in the subcommittee, piracy of copyrighted material is a massive global problem that threatens a large part of the United States economy. Given the urgency of the issue, its effects on U.S. consumers and the economy, as well as the negative impact the abuse of copyright protection can have

on consumer choice, it is my sincere hope that we can further examine these important issues to see if a bipartisan consensus can be reached on this bill.

In conclusion, I support fair and balanced intellectual property rights and laws. I also realize that the rest of the world sometimes does not play by our rules. Protecting the consumer by offering choice in the marketplace while vigorously safeguarding intellectual property and encouraging innovation are foremost concerns of the subcommittee. With that in mind, I believe today's hearing will help us further define the issues and challenges involved as well as explore ways to continue to maintain the careful balance between the public's right of "fair use" and a copyright holder's right to protect their intellectual property.

I look forward to our witnesses and with that, I welcome the distinguished ranking member, Ms. Schakowsky.

Ms. SCHAKOWSKY. Thank you, Chairman Stearns for holding today's hearing on our colleagues' bill, Representatives Boucher and Doolittle, H.R. 107, the Digital Media Consumers' Rights Act. Once again, technological innovations have thrust our subcommittee into legislative arenas that could not have been anticipated. We find ourselves needing to update laws that are now ineffective or perhaps too stifling because of changing technologies.

When we propose legislative responses to outdated laws, we must remain vigilant about the consequences our proposals could have on the spectrum of affected parties. H.R. 107 focuses our attention on how the digitizing copyrighted materials affect artists, consumers, researchers, librarians and a host of industries.

In 1998, before I came to Congress, with the passing of the Digital Millennium Copyright Act, or the DMCA, my colleagues made an important attempt at contending with new challenges that technology brought to copyright laws. The DMCA was meant to stop copyright infringement on new digital mediums. Unfortunately, by trying to predict where the ever evasive nature of technology would take us, the DMCA was drafted with such broad strokes that it swept away the fair use provisions of the copyright law and now is being abused by those who want to squelch competition in areas wholly unrelated to copyright.

For example, manufacturers of garage door openers and toner cartridges have used the DMCA to try and prevent their competitors from developing alternative and cheaper models. However, the competition's efforts to provide a better product to consumers are challenged under the DMCA. Remember, they are not infringing on a copyright or violating any patents.

Make no mistake about it, copyright needs to be protected and artists need to be compensated for their work. However, when a law pits artists against consumers, the source of pay for artists when companies can use the DMCA, I suppose copyright protection to stop new products coming on the market, when libraries may have to charge for services they traditionally have provided for free, then the law needs to be fixed.

Although there are some issues that still need to be addressed, in my view, and some language that needs to be tightened, Congressman Boucher's bill is a step in the direction we need to take so that we can rein in over reaching applications of the DMCA.

I have been talking with artists' groups, consumer groups and technology developers and Congressman Boucher and truly believe that we can work together to craft a remedy to the DMCA that would protect artists' copyrights, consumer rights, competition and technological innovation. This is an exciting time. We're at a technological crossroad that is changing how we think about commerce, art distribution and traditional consumer protections.

It is our responsibility as lawmakers to make sure that all voices are heard in this debate. That's why I'm so glad we are here today, including our former colleague in the House of Representatives with so many people who are affected by the decisions we will be making in the near future.

Thank you, Mr. Chairman.

Mr. STEARNS. I thank my colleague. The Chairman of the Energy and Commerce Committee, the distinguished gentleman from Texas, Mr. Barton.

Chairman BARTON. Thank you, Mr. Stearns. I want to commend you for holding this hearing. I want to welcome my two colleagues, Mr. Boucher, a member of the committee and Mr. Doolittle, a senior Member of the House and former Congressman, Al Swift, who is going to testify later, a former member of this committee and a former subcommittee chairman of this committee. So we welcome you to this important hearing.

I want to start off by saying that I'm very proud to be a co-sponsor of the legislation that's being considered today, H.R. 107, the Digital Media Consumers' Act, sponsored by Mr. Boucher and Mr. Doolittle. Two weeks ago during a hearing before this same subcommittee, I made my feelings and intentions explicitly clear regarding the issue of spyware. I object strongly to any company invading my computer uninvited and planting software or other tracking devices to spy on me. My computer is my property, no different than my home. I determine who I permit to enter, how long they can stay, what they can do while they're in my home. Anyone who enters my house uninvited and without my knowledge is trespassing at the least and possibly breaking and entering.

Similarly, after I buy a music video or a movie CD, it is mine once I leave the store. Does that mean that I am under the impression that I have unlimited rights? Of course not. I understand that I'm limited under existing law to activities that are not commercial and I want to emphasize that, not commercial, or would come into competition with the manufacturer of that product. Currently law provides that I am liable for anything that I do that amounts to copyright infringement under Section 106 of the Copyright Act. It is illegal, as it should be, to buy a CD and to make multiple copies for the purpose of selling them for a profit.

However, we have a long history of copyright law that permits so-called "fair use" of copyrighted material. This allows me to make a copy of music to play in my car, to make a compilation of my favorite songs from my CDs to keep at home. Technology has facilitated the ability to make personal copies that are of commercial quality. Unfortunately, this has posed many piracy problems for the content providers and for those of you that represent those interests I have very, very deep sympathy for the problems that you're facing against commercial piracy.

The Digital Millennium Copyright Act, or DMCA, sought to provide meaningful protection for the content providers while at the same time balancing the consumers' rights to fair use. The anti-circumvention provision was intended to be consistent with the protections afforded under Section 106 and to provide content providers the ability to use technology to prevent illegal copying. We're now beginning to understand that some of the fair use by consumers are no longer protected because of the anti-circumvention provision. The intent of the legislation that we're holding the hearing on today, H.R. 107, is to restore the ability of consumers to use copyrighted material lawfully. It would permit consumers the ability to circumvent copy protection technology as long as it is consistent with fair use. At the same time, H.R. 107 maintains the protections for copyright producers to use copy protection technology against illegal piracy. The balance between consumer rights and producer rights over copyright material needs to be restored to ensure our society progresses and does not regress.

This legislation accomplishes that goal and I support it. Having said that, and this is very important, this hearing is being held to give all sides of this debate a fair hearing to see if we can find a fair compromise that allows for fair use.

With that, Mr. Chairman, I yield back my time.

Mr. STEARNS. I thank the gentleman. The gentlelady from Missouri, Ms. McCarthy.

Ms. McCARTHY. Thank you, Mr. Chairman. I'm going to put my extended remarks into the record. I'm very grateful for this hearing—

Mr. STEARNS. We have a large number, we have three panels, so as much as possible, if members could limit their opening statements or put it in the record, it would be very helpful.

Ms. McCARTHY. Yes, I'm very grateful to everyone who is a part of this, to the panelists, to my colleagues. I think this is a very important issue and I'm going to put my remarks in the record so we have more time to hear from them and to ask them questions. With that, I yield back.

Mr. STEARNS. And I thank the gentlelady. Mr. Ferguson, Mr. Issa?

Mr. ISSA. Thank you, Mr. Chairman, and I too will revise and extend and be very, very brief. I'd like to thank you, Mr. Chairman for holding this hearing. I'd like to thank my colleagues for authoring and co-authoring this legislation.

I am not a co-sponsor of it, but I am deeply interested in the issue and believe that it is this committee's responsibility in concern, of course, with the Judiciary Committee to find real, viable solutions that will restore the historic fair use, will at the same time protecting that which is right now not protected. We've already seen the considerable loss of revenue and if you will, the wanton piracy of music in this country. We cannot afford to have our movie industry destroyed by an open protocol for commercial quality DVD and then beyond for that matter, the broadcast high definition that is beginning to emerge.

I would only say, Mr. Chairman, that it is unusual for this committee which is often accused of having solutions in search of a problem, it is unusual to have such an obvious problem. A Federal

Court has already enjoined a company, Studio 321, and we will be hearing from their CEO shortly, that made a good faith effort to somehow bridge the difference between these two competing interests. They may or may not have succeeded. Their solution may or may not be correct, but that wasn't decided in the Federal Court. What was decided was that circumvention preempts fair use.

We need to define how we can, in fact, continue to have what we have historically had, fair use, while at the time we absolutely must protect not just the movie industry, but our broadcast television and all of the other intellectual property produced in this country. And we have to find a way to have that allow a path for digital music to again enjoy a reasonable modicum of protection.

I would say, Mr. Chairman, in closing, for me it's unusual to say that there must be a lose-lose in order to be a win-win. In fact, in order to have the win of new products and new services, those who think that copying other people's intellectual property should be laissez-faire and the government should stay out of it, we're going to lose because we're not going to stay out of it. And those who believe that the government intervening should be a monopoly and a lock on how things were done in the past are going to have to lose. And we're going to have to, as a committee, help craft some in between that is allowing the win-win to go forward and we hope to move that along today.

Thanks, Mr. Chairman, I yield back.

Mr. STEARNS. I thank the gentleman. The gentleman from Texas, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman. I'd like to have my full statement placed in the record.

Mr. STEARNS. By unanimous consent, so ordered.

[The prepared statement of Hon. Gene Green follows:]

PREPARED STATEMENT OF HON. GENE GREEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. Chairman, thank you for holding this hearing on my friend and colleague Mr. Boucher's legislation, H.R. 107.

This bill does strike to the heart of one of the most significant debates for the future of the digital economy—the regulation of intellectual property.

With all of its promise, the digital age has also brought a tremendous amount of intellectual property piracy—the software industry reports losing \$11 billion a year to software piracy, the motion picture industry another \$3-4 billion, and the recording industry \$4.2 billion.

What is scary to people who make software, movies, and music is that those are the figures only the ones they can calculate. Even more losses from online piracy exist, but are very difficult to calculate.

Numerous studies support the theory that many producers have been severely hurt by online piracy. And this is one of the few industries that has a positive balance of trade, reducing our trade deficit.

The question before us today is: how can rampant piracy crimes be stopped or contained while society's beneficial fair use rights are preserved?

While H.R. 107 raises important issues, as a piece of legislation, I do not believe that H.R. 107 properly hits that balance.

I supported the Digital Millennium Copyright Act when Congress approved it, so I do get concerned when I hear reports of the DMCA being used to eliminate aftermarkets for a variety of replacement parts.

But H.R. 107 completely eliminates the major tool that intellectual property holders have to protect their property.

What is the point of having digital rights management at all, if someone can create software to hack it, post his hacking software on the Internet, and software pirates in China download it and start cranking out bootleg copies of The Alamo all in one day?

Consumers may be right to complain that they cannot fast forward through previews on their DVDs. But if the software that allows them to fast forward could also allow piracy, I do not think that is the proper balance.

As a final note, I would like to mention one section of this bill which falls directly under our jurisdiction—FTC labels for copy-protected compact discs.

I think the recording industry knows that sufficiently informing the public of any changes to the CD format is the right thing to do in the first place.

The recording industry certainly has a right to copy-protect their products, but Americans have been buying CDs for well over a decade now and have come to expect their CDs will work in all CD drives and players.

If new copy-protected compact discs do not work in consumers' CD players, the consumer reaction is likely to be very negative.

I hope the parties involved can work together to avoid such situations.

Mr. Chairman, thank you for holding this important hearing on the future of digital intellectual property protection.

Mr. GREEN. I know we have very ambitious panels today and first I want to welcome my good friend and committee member, Rick Boucher and say that the bill, the legislation that came out of Judiciary Committee, I hope our committee takes a good look at because it's interesting. One of the few balance of trade surpluses we've had in our country over the last few years has been the creativity of motion pictures, software and recordings. And I know we need to strike a balance because I want to be able to copy something I buy and give to my children. I just don't want them to be able to print out a million copies. And so we have to strike that balance, but I also know that we don't want to throw out the baby with the bath water, as we say in Texas, and lose the creativity we have in our own country.

And with that, I yield back my time and look forward in participating.

Mr. STEARNS. Thank you. Mr. Shimkus.

Mr. SHIMKUS. I'll defer my opening remarks.

Mr. STEARNS. I thank you very much. The gentleman, Mr. Davis?

Mr. DAVIS. Pass.

Mr. STEARNS. Thank you very much. And Mr. Pitts.

Mr. PITTS. I'll waive.

Mr. STEARNS. Waive. All right. And then we have Mr. Towns, the gentleman from New York.

Mr. TOWNS. Mr. Chairman, I'd like to place my entire statement in the record.

Mr. STEARNS. By unanimous consent, so ordered.

[The prepared statement of Hon. Edolphus Towns follows:]

PREPARED STATEMENT OF HON. EDOLPHUS TOWNS, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF NEW YORK

Let me begin by thanking you Mr. Chairman for holding this important hearing today. In 1998, Congress passed the Digital Millennium Copyright Act (DMCA), which at the time was landmark legislation in setting a regulatory framework for the use and dissemination of digital content. Congress crafted a delicate balance that sought to ensure the protection of valuable creative materials while providing consumers access to new burgeoning technology.

Since that time, two things have occurred which seem very clear to me and I believe are not disputable. First, there has been an explosion in the type and amount of available digital content. Second, piracy and theft of copyrighted material has grown rampant.

While admittedly the creative industries were slow to embrace new technologies, that is no longer the case. Consumers can get digital movies through video on demand, they can rent or buy DVDs, and they can increasingly access digital formats through the Internet. Similarly, there are numerous formats and options for consumers to buy, download or stream digital music. Consumers can now portably ac-

cess thousands of songs in digital format in a device smaller than the size of a wallet.

At the same time, several content companies are facing a significant challenge to prevent copyrighted material from being stolen. Movies are available on-line or on the street in pirated DVDs days after or even before a movie is released. A whole generation has grown up under the assumption that it is OK to steal music. I should note that many of these same circumstances apply to software as well.

Given these two factors at work, it does not make sense to me to increase consumers' ability to circumvent copyrighted material protections. While some will argue that this is a consumer issue, I would respond that this is a jobs issue. Although stars get the coverage, the creative works industry supports thousands of people who work behind the scenes. These jobs are put in jeopardy if investment in creative material is undermined by piracy.

Further, the DMCA provides a mechanism for the automatic review of the act to ensure that consumers have appropriate access to digital content. The tri-annual reviews by the copyright office is already working and this process can accommodate future changes as they become necessary.

I look forward to hearing from today's witnesses about their views on H.R. 107 and the current state of digital content. Thank you Mr. Chairman and I yield back the balance of my time.

Mr. TOWNS. And only comment that I'm happy that you're having this hearing and some will argue that this is a consumer issue. And I would respond that this is a job issue. And we must not forget that.

On that note, Mr. Chairman, I yield back.

Mr. STEARNS. All right, thank you. Mr. Terry?

Mr. TERRY. Waive.

Mr. STEARNS. Waive. All right. I think at this point we have—
Mr. Gonzalez?

Mr. GONZALEZ. I'll waive.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. BARBARA CUBIN, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF WYOMING

Thank you, Mr. Chairman, for holding this hearing today. It is my hope that this will be a valuable forum for debate and discussion regarding this bi-partisan legislation offered by Mr. Boucher.

I would also like to extend my thanks to the many distinguished witnesses who have agreed to appear today. We have been joined by an exceptionally large number of experts representing the views of both the content community and leading advocates for consumer rights. I feel the tremendous interest in witness participation is a true indication of the timeliness of this hearing, and I look forward to learning more about the complexities surrounding the issue of fair use from these specialized experts.

When Congress passed the Digital Millennium Copyright Act (DMCA) in 1998, we could not possibly have foreseen the rapid advances in technology which would ensue in just a few short years. Litigation regarding the "anti-circumvention" clause of the DMCA has successfully limited the rights of consumers to circumvent technologically protected works, and also prohibited the production and availability of circumvention technology. We have arrived at a historic juncture between the rights of consumers to exercise the fair use of legitimately purchased products and the rights of the content industry to restrain the reproduction and distribution of their copyright protected material.

Congress has now been called upon to redefine what measures and technologies are protected by copyright law, and we must treat this matter delicately. I look forward to today's hearing to discover if H.R. 107 will be the proper legislative path to follow in the redefining of fair use.

I thank the Chairman again and yield back the remainder of my time.

PREPARED STATEMENT OF HON. JOSEPH PITTS, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF PENNSYLVANIA

Mr. Chairman, thank you for convening this hearing today to discuss the Digital Media Consumers' Rights Act.

While H.R. 107 may be well-intentioned, it will ultimately discourage creation of intellectual property. Why create when you can copy?

With this in mind, I oppose this legislation.

Today, more Americans have more access than ever before to more of the fruits of American creativity. This includes music, movies, games, computer software, and even books.

The advancement of technology has made it easier to create and easier obtain material that is the product of the creative mind.

Yet while access to intellectual property has increased, so have efforts to copy and pirate this valuable material.

Piracy is not just a problem here in America. Travel to the black markets of China and you can buy just about anything you want. American intellectual property worldwide is illegally copied, bought and sold.

American creativity is a hallmark of this great country. We must protect it. It is easy to see the damage done when our copyright laws here and abroad are violated.

Congress addressed this problem in 1998 with the Digital Millennium Copyright Act (DMCA). This is a good law. It should not be undone.

Unfortunately, that is what H.R. 107 does. It legalizes hacking to circumvent protective encryption for any purpose and it undermines efforts to fight piracy and promote respect for copyright worldwide.

Proponents of this bill say that sharing of intellectual property—the product of American creativity—should not be hindered. It should be a light that is passed on to one another.

I agree to a point. But the purpose of passing on that light is to inspire the imagination to greater levels of creativity. There is nothing inspiring about pirating creativity.

The laws we have in place today, not the least of which is the Digital Millennium Copyright Act, are there to ensure that intellectual property is shared with one another, but in a way that benefits everyone.

Do we have perfect copyright laws? No. But H.R. 107 goes too far and opens a Pandora's box.

I urge my colleagues to oppose this legislation. We must protect American creativity.

Thank you, and I yield back the balance of my time.

PREPARED STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF MICHIGAN

The Digital Millennium Copyright Act (DMCA) is vitally important to the livelihoods of authors, musicians, filmmakers, software developers, and countless other creators of copyrighted works. The digital age has vastly improved the quality of these works, and a limitless number of digital copies can now be made with virtually no distortion and no reduction in quality.

While developments in digital technology provide many benefits to content producers and consumers, this new medium also provides fertile ground for pirates to steal these protected works. The DMCA was passed to provide copyright owners with additional protections and tools to help prevent their works from being stolen and illegally distributed, and it appears thus far to be successful in achieving that objective.

There is, however, another important side to this issue. When the Committee on Energy and Commerce first considered the DMCA in 1998, I was concerned that certain provisions in the legislation were overly broad and could make it illegal for anyone to circumvent a copyright protection measure, even if the circumvention was performed for an otherwise legal purpose. For example, if a school or library copied a portion of an article for educational use, that copy would be permitted under the "fair use" doctrine of copyright law. If that article was in electronic or digital form, however, the school or library may not be able to copy any portion of it without first circumventing a copyright protection measure. The act of circumvention itself would be a crime, even though it was undertaken for a perfectly legal purpose: that is, to make "fair use" of the underlying materials.

Such a result could seriously undermine the careful balance between the rights of copyright owners to be compensated for their works, and the rights of educators, researchers, and others to freely use portions of these works to enhance knowledge

and understanding for the common good. Restrictive provisions such as these had the potential to stifle innovations in digital commerce, impeding the development of new hardware, software, and encryption technologies. Many members of this Committee and I sought to preserve a balance among these vitally important interests, and we were hopeful that such a balance had been achieved when we supported the Conference Report for the DMCA.

It has now been six years since the DMCA became law, and it is important for this Committee to review its progress. These hearings will allow us to explore whether the DMCA has achieved a proper balance after all, or whether further action is required. The Committee on Energy and Commerce should closely examine the current system to find the appropriate balance that protects scholarship, research, and innovation while protecting the legitimate interests of copyright owners.

I look forward to continuing this important work and hope that all sides of this issue will work closely with us in this endeavor.

Mr. STEARNS. Thank you. I thank my colleagues and with that we welcome our two colleagues, Mr. Boucher and Mr. Doolittle and we look forward to your opening statement.

STATEMENTS OF HON. RICK BOUCHER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA; AND HON. JOHN T. DOOLITTLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. BOUCHER. You'd think after serving on this committee for 22 years, I would have learned that.

I've always been challenged by technology.

Thank you very much, Chairman Stearns for conducting this hearing today. I want to extend my thanks to you, to Ranking Member Schakowsky, to Chairman Barton of the full committee and to the members of your subcommittee for the interest that you're expressing by having this hearing today and assuring that we have appropriate balance in our copyright laws between the rights of the users of intellectual property and the rights of those who create it.

I also appreciate your interest in examining the possible need for changes in the 1998 statute, the Digital Millennium Copyright Act.

I want to say thank you to my friend and colleague from California, Congressman John Doolittle. My staff and I have worked very closely with John and his staff as we structured the measure that is before you and I want to thank Congressman Doolittle for his strong advocacy of the changes that we're seeking to make.

I would also like to say a special word of welcome this morning to our former colleague on this committee, a former distinguished Member of the U.S. Congress, Congressman Al Swift, who is here to testify in support of H.R. 107.

And I'm very pleased to see the broad range of witnesses who you have assembled today, possessing a tremendous amount of expertise on intellectual property and commercial issues. I am very pleased to see both the proponents and the opponents of H.R. 107, although I'll have to confess that I'm a bit more pleased to see the proponents.

In the 1990's, the entertainment industry came to the Congress and basically made an appealing claim. The entertainment industry said digital is different and there are twin threats simultaneously arriving that dramatically enhance the potential for the piracy of intellectual property. Those twin threats were identified as first of all, the arrival of digital media through which a copy of a

copy of a copy has the same clarity and integrity as the original of the work. The other threat that arrived at the same time was the internet, beginning to be used as a mass communication medium and through the internet thousands of copies can be transmitted around the globe with the click of a mouse.

That was an appealing claim. The industry said we have a threat coming from these two sources of enhanced piracy and Congress should provide greater protection to those who create intellectual property. I thought that the industry needed greater protection. In the end, I voted for the Digital Millennium Copyright Act. But during the course of hearings and debate in both of the committees that considered the bill, the House Judiciary Committee and this committee, I expressed concern about the over reaching nature of the DMCA as it was being debated. I offered amendments that were very similar to those that we are recommended for enactment by this committee in H.R. 107.

We've now had 6 years of experience since the passage of the DMCA and many people who I think did not perceive that user rights were being threatened by the very broad nature of that statute, are now convinced that user rights have been eroded.

In 1998, most of the technology community was uninterested in this debate. We did not have computer manufacturers actively involved. The home recording rights industry was involved and was effective in the debate, but the broader technology community was not. Today, that broader technology community is supportive of H.R. 107 and very interested in seeing these changes made. We have computer manufacturers such as Gateway, Sun Microsystems, component manufacturers such as Intel. We have all of the major local telephone companies and their trade association, the U.S. Telecom Association, strongly endorsing and urging the passage of this bill. These were parties not involved in the debate in 1998.

We also have a broad and deeply interested public interest community, comprised of librarians, universities, the two largest consumer organizations in the nature. We have public knowledge, the Electronic Frontier Foundation and others on the public interest side expressing their concern about the experience that we had with the DMCA since 1998 and urging that the changes contained within H.R. 107 be adopted.

The bill that we've put forward addresses four principal problems. Let me briefly describe what each of those is and what our proposed remedy is and he's saying very briefly.

The first principal problem that we have is that as Chairman Barton indicated in his opening statement, the current law says that it is a Federal offense to bypass technical protection guarding access to a copyrighted work, even though the purpose of the bypass is innocent. And so if a person is bypassing for the purpose of exercising a fair use right, that person is guilty of a Federal crime. If you're bypassing for the purpose of getting beyond the commercials that are on the front end of a DVD, that you have gone to the store and rented, if you want to bypass in order to fast forward through material that's on the DVD that you think is inappropriate for your children to see, you have committed a Federal offense if you engage in that act of bypass, even though the purpose of the bypass is innocent.

We are proposing as our first provision that bypass of technical protection is legitimate as long as the purpose of the bypass is itself legitimate. So if a person is bypassing to exercise a fair use right that act of bypass would not be punishable under the law. I would stress that a person who bypasses under our bill for the purpose of infringing the copyright and the work would be just as guilty of a Federal crime as he is today under the current law. In fact, he would be guilty of two violations, the act of bypass itself and the act of infringing the copyright in the work. And that is the same penalty, the same substantive violation that he would encounter under current law. And so this provision is not a charter for pirates. It would punish pirates just as severely as under current law.

Second, we are proposing that devices that can facilitate circumvention for legitimate purposes be authorized. The Supreme Court in its Betamax decision in the middle 1980's set forth a very sound legal principle that provided a foundation of legal certainty upon which the home recording industry has been based and that industry has flourished and significantly enriched the American economy and improved the quality of life of millions of Americans. That legal foundation was a very simple test and that is that the only question you have to ask when you're determining whether or not technology is legitimate is whether or not the technology is capable of substantial noninfringing use. And if it is, the manufacturer will not be held accountable for contributory infringement. We are proposing to reinsert that valuable and time tested principle as the test for determining whether or not circumvention technology can be provided.

Two other provisions, very briefly stated. First of all, if you go to the store and you buy a copy protected CD, you should notice of the fact that it's copy protected, that you may not be able to take it home and create your own play list on your computer or create your own CD with music organized in precisely the fashion in which you want to hear it. You should have notice of that fact so it requires appropriate labeling.

The second provision says that the existing exemption for encryption research would be broadened to include scientific research on technical protection measures. And this provision responds to a recommendation made by Richard Clark when he was the cyber security head in the White House and to many others who would like to have people who want to consume technical protection measures be given the legal certainty that they are robust, that they are durable, that they are functional and only independent research can guarantee that. Independent research cannot be conducted today because of the narrow scope of the existing exemption.

These are our four provisions.

Mr. Chairman, I think they are modest amendments indeed. They are broadly supported by the organizations that have participated in their formulation and are urging the passage of this bill, as well as by a bipartisan group of Members of the House. And I very much hope it will be the privilege of the pleasure of this subcommittee to act affirmatively on them.

And I thank you very much for giving the time to speak.

Mr. STEARNS. And I thank the gentleman.
And our colleague from California, Mr. Doolittle, welcome.

STATEMENT OF HON. JOHN T. DOOLITTLE

Mr. DOOLITTLE. Thank you, Mr. Chairman, and distinguished members. I very much appreciate your affording us the opportunity to air these issues and have a hearing on this bill. I commend Mr. Boucher who has studied this over a number of years and who is somewhat of an authority, really, on these issues as you can see from listening to description of the legislation. And I'm very grateful that we have this bipartisan opportunity to address what I think is a very, very significant issue.

A couple of years ago I yielded to the ads because I was curious to see what these were about. This is an Apple iPod and now we have a number of MP3 players like this. This is a very interesting device. You can take your entire CD collection put it on your computer and download it from there onto this. You can also take books on CD and download them onto this. At least you can for now. Until the copyright holders may decide through technology they may desire to employ to prevent that use, the DMCA would give them that right. Increasingly, we're having a number of CDs now that are coming out with encryption.

I paid for this. I bought the material that I'm downloading onto it, but I may be prevented at some point from being able to take advantage of what is a very convenient technology. It's very portable. It's like a little portable hard drive and you know, I'm sorry to say, unlike Ms. Schakowsky, who wasn't here in 1998, I was. And I didn't grasp what the real issues were at stake in this DMCA at the time that it came before the House.

I have a better handle on it now and I think we went way overboard as a Congress in enacting that legislation. It needs to be corrected. There is always going to be, as I understand it, a dynamic tension between the copyright law and new technologies. Fair use represents the interface, as some have written, between those two major interests. Fair use has been severely disadvantaged by the present DMCA.

I'm sure we've all heard about the high definition television and many of us no doubt have experienced what that actually is. And as good as the picture used to be, now that you've seen the high definition picture, there's a radical difference between the quality of the two. Increasingly, we will be moving more and more in the direction of high definition images. And many of you no doubt have experienced the digital video recorders or PVRs such as TiVo or ReplayTV and going well beyond what a VCR can do. Now this is like a hard drive. You can record these things and without trying to find where on the videotape this thing is, you can go right to it with a very convenient menu.

One would hope that we would be able to do such things with high definition, but that's all up to the good will of the copyright holders as to whether they're going to allow us to do that. And indeed schemes are being proposed that might allow you to record on some sort of a personal video recorder, the high definition image, but if you seek to create, free up space in your hard drive by downloading it to a disk, you may be prescribed from doing it.

You'll just have to view it at the regular DVD quality, not at the high definition quality that technology is going to be capable of producing.

Well, as we move forward, it doesn't seem like any big deal perhaps, because this isn't that widespread, but once you're thoroughly accustomed to the resolution and the quality of high definition television and then to be limited by this technology and forced by the power of the government through the DMCA, it will be—there will be an increasing disparity when you will wish you could save this onto a disk and free up that space for further recording, but you will not be able to do it at the quality that you would like and the technology would allow because of the DMCA.

Mr. Boucher's bill, which he has introduced, will help set the balance where it needs to be. You're never going to get rid of the tension, as I understand it, between the copyright law and new technologies. This is a tension that's inherent in a free society and it balances the interest and you're going to move forward and new technologies are going to come and Courts and ultimately the Congress are going to draw the line as to what's fair use and what isn't.

Right now that line has been drawn way over in favor of the copyright holder. Let me just say if the DMCA, as I understand it, had been law at the time the VCR was invented in the middle or late 1970's, middle, I guess, you probably would have—we wouldn't have the ability that we've come to appreciate because they would have been able to insist that a chip be inserted in the VCR which in fact they did, the plaintiffs in that suit did ask for that from the Court and that would have prevented the VCR from even recording movies or TV programs that had the signal contained that said you could not record it. So the public would never have even known this. And that's the failure of the DMCA to allow these new technologies, let the Courts decide where the balance is and ultimately the Congress gets to draw the line after this experimentation process has continued.

I fully support the right of property owners to get their due. I have never detracted from that. But there also the rights of the public through fair use and I think these have been severely circumscribed by the present law and this bill represents the first tangible opportunity to begin to redress the wrongs that were done in 1998 when the DMCA was enacted into law. I thank you very much for this chance to address you and I look forward to the hearing.

Mr. STEARNS. I thank both of my colleagues for their very fine testimony and we're going to go directly to the second panel. We have two panels after you and we have a long list of people so I know they'll advocate for and against what you have already proposed. So with that, my colleagues, we'll bring up Mr. Lawrence Lessig who is Professor of Law at Stanford Law School; Mr. Gary Shapiro, President and Chief Executive Officer of Consumer Electronics Association; Mr. Jack Valenti, President and Chief Executive Officer of the Motion Picture Association of America; Mr. Robert W. Holleyman, President and Chief Executive Officer, Business Software Alliance; our former colleague, Congressman Allan Swift

from Colling Murphy; and Ms. Miriam M. Nisbet, Legislative Counsel, the American Library Association.

Let me welcome all of you and we'll start with you, Mr. Lessig for your opening statement.

**STATEMENTS OF LAWRENCE LESSIG, PROFESSOR OF LAW,
STANFORD LAW SCHOOL; GARY J. SHAPIRO, PRESIDENT
AND CHIEF EXECUTIVE OFFICER, CONSUMER ELECTRONICS
ASSOCIATION; JACK VALENTI, PRESIDENT AND CHIEF EXEC-
UTIVE OFFICER, MOTION PICTURE ASSOCIATION OF AMER-
ICA; ROBERT W. HOLLEYMAN, PRESIDENT AND CHIEF EXEC-
UTIVE OFFICER, BUSINESS SOFTWARE ALLIANCE; HON. AL
SWIFT, COLLING MURPHY; AND MIRIAM M. NISBET, LEGIS-
LATIVE COUNSEL, AMERICAN LIBRARY ASSOCIATION**

Mr. LESSIG. Thank you, Mr. Chairman. There are members of this committee who have criticized the IRS, but who believe that in a civilized society individuals must pay taxes. There are members of this committee who have criticized particular regulations of EPA, but who believe that the government has an important obligation to protect our environment.

I am critical of our copyright system, but I fundamentally believe in the critical role that copyright must play in protecting creators and supporting creative industries. I believe commercial piracy is wrong. I believe it is just as wrong to substitute a purchase of a Britney Spears' CD by stealing it from Tower Records or to download it from a peer-to-peer network, not to mention what it says about your taste in music. I believe in copyright.

But I also believe that copyright law is broken. Copyright law regulates too much. It regulates too inefficiently. It often regulates precisely the wrong kind of creative activity. The law was crafted against a background radically different technologies for producing and sharing content. In its present form, it often hinders more than it helps and like any massive system of Federal regulation, the law is often a tool that the dominant industry uses to protect itself against competition.

There has never been a time in the history of our Nation or of any free nation when the monopoly that we call copyright has reached as broadly, as extensively for as long as inefficiently or as punitively. The regulatory process that controls creativity in America today is massively overly extended. But paradoxically, it's also my view that relatively small changes in the law of copyright can restore the balance that historically has defined Congress' treatment of this important aspect of Federal regulation. And I particularly believe that the bill that you're considering today, H.R. 107, is an extraordinarily important first step in restoring the balance in copyright law that Congress has the primary obligation to seek.

Now as Congressman Boucher has described there are four important parts of that bill. I want to focus on just one. This is the amendment to the DMCA that essentially establishes that if the use of the underlying copyrighted material would be fair under copyright law, then it's not a crime to circumvent the technology to enable that use. Now the second time I had the privilege of debating Jack Valenti, Jack Valenti stood before the audience and like a student having discovered his key case, held in his hands a

decision of the Second Circuit Court of Appeals which he interpreted to say that fair use was not a constitutional requirement under our system of free speech. He was excited because that meant that it was possible for Congress to remove fair use if they wanted and if the DMCA did that, then so much the worse for fair use.

Well, I'm privileged to be able to sit before you today and hold in my hand a decision from the United States Supreme Court which stands above the Second Circuit Court of Appeals, a case which I argued before the Supreme Court and which I lost before the Supreme Court, but which has one line of silver lining in its decision which it says that fair use is a traditional contour of copyright and if Congress removes it, then it raises a fundamental first amendment problem, that Congress cannot directly remove fair use and I think the fair implication of that is it cannot indirectly remove fair use because indirectly removing fair use also creates a free speech problem.

Now as Congressman Boucher has established and as this bill addresses, the effect of these regulations is to remove fair use in many important contexts. Now I understand the content industry feels that it's fighting a war. In fact, Jack Valenti has called this his own terrorist war where our children are apparently the terrorists. And I understand there are many who believe that fundamental rights should stand aside in the context of the war, especially a terrorist war. But our Constitution means something different here. It means that the rights of free speech trump and the fundamental right of free speech protected by fair use must be respected by Congress and will be respected by the Courts. And this small change in the scope of the DMCA, whatever problems it creates for industry is creating problems because of our fundamental commitment to a system of free speech. Fair use is a part of that system.

Thank you very much.

[The prepared statement of Lawrence Lessig follows:]

PREPARED STATEMENT OF LAWRENCE LESSIG, PROFESSOR, STANFORD LAW SCHOOL.

Mr. Chairman, and Members of the Committee: I am the John A. Wilson Distinguished Scholar, and a Professor of Law at Stanford Law School. I have written extensively about new technologies and legal policy. As a lawyer, I have been involved in a wide range of litigation involving copyright and the Internet. I am Chairman of the Board of Creative Commons, and a member of the boards of Public Knowledge, the Public Library of Science, EFF and the Free Software Foundation. I direct the Stanford Center for Internet and Society.

I am grateful for the opportunity to testify before you today, and offer the following to help your deliberations.

Copyright law is an essential protection for authors and creators. It is a necessary protection for creative industries and commerce. Innovation and creativity depend upon adequate and reliable copyright protection. Commercial piracy is therefore an important threat that the government rightly should address.

Yet in its eagerness to staunch commercial piracy, the law must not lose sight of the crucial balance in copyright that has also been at the core of our tradition. These limits in the United States have historically guaranteed that the benefits of copyright regulation do not outweigh its costs. A poorly crafted copyright law—a law that either creates too much uncertainty, or a law that extends its reach beyond its legitimate purpose—can stifle progress rather than promote it.

"Fair use" is one important limitation upon the regulation of copyright. Historically, it has neither been the most important or most familiar. The efforts of this Committee to consider whether fair use is adequately protected in the digital age is an important first step in striking the right balance in the regulation of copyright.

But it is only a first step. In my view, Congress's zealous efforts to attack "piracy" have had the unintended collateral effect of destroying a crucial balance in copyright law. Never in the history of our nation has the law of copyright regulated as broadly; never has it regulated as extensively. And in light of the creative and commercial potential of digital technologies, never has the law burdened creative work as directly or pervasively. If copyright litigation promises to become the "asbestos litigation for the Internet Age," as Stewart Baker recently wrote in the *Wall Street Journal*,¹ then the actual law of copyright promises to become the IRS code of the creative class. The direct beneficiaries of this massive change in legal regulation are existing, highly concentrated, copyright industries, and lawyers. Those burdened by this regulation are increasingly creators and innovators, both commercial and non-commercial.

In my view, Congress should systematically reconsider the scope of federal regulation governing the creative process. It should reevaluate, in light of the massive changes that digital technology produces, the best way to protect the legitimate interests of creators. Rules that made sense even just 30 years ago are highly questionable today. Congress's objective must be to guarantee that the regulation of creative work continues to serve the single constitutional purpose of that regulation: to "promote the Progress of Science."

I know from personal experience that the position I mean to advance before this Committee is apparently difficult for many to understand. No doubt that failure is in part due to the rhetoric of some of us on this side of the debate. So let me state as simply and clearly as I can: My argument is for balance in copyright regulation. Yet many hear such an argument as an argument against copyright. A kind of "IP McCarthyism" seems to govern this debate. The rhetoric from both extremes makes it sound as if the only choices were between two extremes.

This view is a profoundly costly mistake for both commerce and innovation generally. Congress must begin to recognize the radical change in the scope and reach of copyright regulation in just the past twenty years. In part that change is the product of legislation; in part it is the unintended consequence of copyright law applied to vastly different technologies. As I have tried to demonstrate in my own work,² the consequences of these changes together are to burden creativity, and stifle commercial innovation. Neither effect is a necessary consequence of a well-crafted copyright law.

Just as one can criticize the tax code without criticizing the idea that in a civilized society, citizens must pay taxes, and just as one can criticize the regulations of OSHA without believing that business should be free from safety regulation, so too can one criticize the extremism that copyright law has become without criticizing the idea that copyright is essential to creative work, and to creative industries. That it is essential is my view; that it has become too costly and inefficient is also my view.

It is for this reason too that it is extremely important that these issues be considered by this Committee. The history of regulation being used as a tool to stifle competition is long. And as this Committee knows well, only a careful and consistent monitoring of regulation can assure that the law not become a tool that industries use to protect themselves from new competition. Every generation will view the innovations of the next generation as troubling and threatening. But those same innovations keep competition vigorous. As Adam Smith famously remarked, competitors are always seeking ways to stifle competition. Federal monopolies, which copyrights are, are often the most effective tool. Copyrights are no doubt important. But the Constitution gives Congress the power not to grant copyrights, but to "promote the Progress of Science."

In the testimony that follows, I briefly outline the historical balance that copyright law struck. I then consider the current position of "fair use," in light of the changes that I describe. Against this background, I argue that H.R. 107 is an important step in restoring balance to copyright. And finally, I conclude with other efforts Congress might consider to further balance copyright law in light of new technologies.

THE HISTORICAL BALANCE OF COPYRIGHT

As the Supreme Court has repeated, and as the late Professor Lyman Ray Patterson made clear,³ copyright "has never accorded the copyright owner complete control

¹ Stewart Baker, Review, *Wall Street Journal*, W6, March 26, 2004.

² The Future of Ideas (2001); Free Culture (2004).

³ See Lyman Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 Vand. L. Rev. 1, 46 (1987).

over all possible uses of his work.”⁴ Its purpose instead is to secure a limited monopoly over certain ways in which creative work is exploited, so as to give authors an incentive to create, and thus, in turn, to “promote the Progress of Science.”

Originally, the trigger for that protection was the act of “publishing” a work. The first Copyright Act secured an exclusive right to the authors over the publication of “maps, charts, and books.”⁵ In 1909, the scope of that right was expanded to give authors an exclusive right over “copies.”⁶ Against the background of the technology extant in 1909, that change was probably not intended as a substantive change in the reach of the law, and in any case, was not significant: For printed texts, the technologies of “copying” were essentially the same as the technologies of “publishing.”

Before digital technologies, this pattern of regulation meant that while some “uses” of copyrighted material were plainly regulated under the law—publishing a book, or reprinting a chapter—many uses were *unregulated* under the law. Reading a physical book, for example, is an unregulated use under the law, since reading a book does not produce a copy. Giving someone a book is an unregulated use, since giving someone a book does not produce a copy. These uses are thus independent of the regulation of copyright. And these unregulated uses support many important commercial activities, including used bookstores and libraries.

Unregulated uses are not the same as “fair use.” “Fair use” is a privileged use of a copyrighted work that otherwise would have infringed an exclusive right. It is, in other words, a copy that the user is privileged to make regardless of the desire of the copyright owner. Thus, reading a book is an unregulated act under copyright law. But quoting a book in a critical review is a presumptively regulated use (because a quote is a copy), yet privileged under the law of fair use.

The traditional contours of copyright law thus secured to authors exclusive rights over just some uses of their creative work. But it secured to consumers and the public *unregulated access* to that creative work for most ordinary uses. And it privileged the public for some uses that would otherwise have infringed the exclusive right to copy.

This traditional balance has been changed in the context of digital technologies. For it is in the nature of digital technologies that every use of a digital object produces a copy. Thus every use of a digital object is presumptively within the scope of copyright law’s regulation. And that in turn means many ordinary uses must now either seek permission first, or rely upon the doctrine of “fair use” to excuse what otherwise would be an infringement.

For example, the ordinary use of reading a book—unregulated by copyright law for a physical book—is now regulated by copyright law on a digital network: as any act on a digital network, produces a copy, so too does merely reading a book. The same with “lending” a book, or selling a book—all these produce copies; all these are regulated on a digital network; none of these would have been regulated outside of a digital network.

These changes are the unintended consequence of the interaction between digital networks and a form of copyright law that triggers liability upon the making of copies. Their consequence is that the law now reaches far more broadly than it ever did before. And when tied to the unconditional reach of copyright after the abandonment of copyright formalities, they mean that the burden of copyright applies in a vast range of contexts in which it does not also provide any copyright related benefits.

THE CURRENT INADEQUACY OF FAIR USE

There are many who believe that “fair use” is an adequate balance within copyright law. I believe that at present, this view is mistaken for three related reasons.

First, as the history just sketched suggests, the doctrine of “fair use” has not historically been relied upon to free ordinary uses of copyrighted material from the regulation of the law. Instead, ordinary uses were free of regulation because copyright law did not cover those uses. “Fair use” originally regulated uses by *competitors* to the copyright owner.⁷ It didn’t regulate uses by consumers. Yet given the fundamental shift of copyright’s reach, it is now the rights of consumers to use content in ordinary ways that must be defended through the doctrine of “fair use.”

Second, as any *practical* understanding of the law reveals, “fair use” is an extraordinarily uncertain freedom. The test is crafted as a balancing test, with no single

⁴ *Sony v. Universal City Studios*, 464 U.S. 417, 432 (1984).

⁵ Act of May 31, 1790, 1 Stat. 124.

⁶ Patterson, *supra*, at 12.

⁷ *Id.*

factor as determinative. This means that *ex ante*, it is extremely hard for creators and publishers to know precisely what freedom the law allows. This either forces publishers to impose rules that are far more strict than fair use,⁸ or it forces creators to clear permissions upfront. And when that permission cannot be secured, it forces the creator into an extremely difficult choice: whether to risk substantial exposure for copyright liability, or to remove the speech from the creator's work.

A recent example involving NBC makes this hypothetical more salient. Cinema Libre intends to distribute an award-winning documentary about the Iraq War by film director and producer Robert Greenwald, titled "Uncovered." In preparing the extended version of the film, Greenwald wanted to include a one-minute clip from NBC's "Meet the Press" interview with the President. Greenwald was denied permission. The agent informing Greenwald's agent of the decision stated, "unofficially, we don't believe it makes the President look good." And thus Greenwald and Cinema Libre are now confronted with a stark and odd choice for a democracy protected by the First Amendment: Should they risk substantial liability simply to repeat the words the President of the United States?

These costs of fair use are significant both to commercial and creative potential. Though some naively believe the costs of seeking permission are slight, in fact those costs are prohibitively high for all but a few commercial creators. Indeed, because the costs of giving permission are often higher than any possible revenue from that permission, many rights owners adopt a simple presumption against giving permission. Transaction costs thus bury creative work under a system of uncertain fair and free use.

Finally, and most directly related to the issues before this Committee today, "fair use" is effectively erased by technical measures that block ordinary or fair uses of creative material, and by legal rules that render illegal technologies that might help evade those restrictions. Thus, technologies that restrict the ability to capture a clip from a DVD for educational purposes, or that restrict the ability of consumers to backup digital media, interfere with uses that would, under the law of copyright, be deemed fair. And under the DMCA, efforts to evade those restrictions are prohibited.

These three reasons together suggest that "fair use" in its current state will not suffice to secure a balance between the control copyright regulation secures, and the access that copyright is meant to guarantee. It is therefore crucial that Congress consider a range of measures to update fair use in the digital age. H.R. 107 is an important beginning, as I describe below. But I would not let it be the last.

Fair use has been a central aspect of American copyright law. It is less familiar within other legal traditions. Indeed, this difference may well account for the relatively anemic understanding of fair use offered by trade associations, including the RIAA. As every major label in that trade organization is now owned by foreign corporations, it is not surprising that those labels find our tradition to be alien. "Fair use," as a senior executive at one of the major labels recently put it, "is the last refuge of scoundrels." I understand how that may be the view of some in the world. But within our tradition, fair use is a core freedom.

In its current state, however, fair use does not effectively protect consumers and creators in their transformative use of creative material. That in turn increasingly stifles commerce as well as creativity.

One useful example of this consequence is the litigation surrounding MP3.COM. MP3.COM designed a technology to enable consumers to verify to a computer that they owned or possessed a CD. Once that fact was verified, the company gave the consumer access to the content on that CD from any computer on the network. These password protected accounts served to validate and protect the selected music. And they were supported by MP3.COM's purchasing and copying 50,000 CDs onto MP3.COM's servers.

Because the company was simply giving customers access to music they had already presumptively purchased, and because the service in fact made the music that people had purchased more valuable, MP3.COM believed its business model was protected by "fair use." Some recording labels and artists disagreed, and sued MP3.COM. Months later, a court found the company liable, and fined the company over \$120,000,000, and effectively forced the company into bankruptcy. When one of the labels suing MP3.COM purchased the company, it then filed a lawsuit against MP3.COM's lawyers, charging them with malpractice in advising MP3.COM the company that its business model was legal.

⁸See William F. Patry and Richard Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, California Law Review (forthcoming 2004).

That case has subsequently been criticized by Judge Richard Posner.⁹ But my point here is not to take sides in the matter (although I agree with Judge Posner). It is instead to make the obvious point that a committee on Commerce would well understand: if the doctrine of fair use is so uncertain that senior and respected judges would apply it differently in the same case, and yet exposes innovators to such severe liability, we can expect (as we have observed in Silicon Valley) that this legal uncertainty will chill business investment.

H.R. 107

H.R. 107 is an important first step in reststriking a balance in copyright law. The bill would make two significant changes. It would first, and least controversially, require adequate labeling of copy-protected CDs. And second, it would eliminate anti-circumvention regulation in contexts in which there is no underlying copyright interest at stake.

(1) Labeling

As this Committee is well aware, technologists have been working for many years to find a technological way to control how CDs are used by consumers. In particular, they have sought a technological way to assure that a CD could be played, but that its content could not be copied.

Such a technology, given the open implementation of CD protocols, is extraordinarily difficult to perfect. And hence the risk that any particular technology will not work on a particular machine is high.

“Not work” however can mean much more than simply not playing. In some reported cases, copy-protection technologies have actually destroyed data on the consumer’s computer. That loss can be extremely costly.

This risk is more significant on less-mainstream computers. Any copy-protection technology is likely to have been tested on the most popular systems. It is economically impossible for these technologies to be tested on every system. Thus, it is certain that some users of these copy-protected technologies will use the technology on a machine for which it has not been tested. And no doubt, some will suffer significant costs from that use.

These costs from copy-protection technologies must be considered in light of an obvious fact: that the ordinary use restricted by these technologies is not, ordinarily, a copyright infringement. A consumer who purchases a CD, and then shifts the content of that CD to his computer so that he can listen to music, engages in a “fair use” of that content. No doubt some might not be protected by fair use—a user who systematically copies CDs borrowed from the library to build his own library of music, for example. But the vast majority of users would be using purchased content in a totally legal way.

In this context, a labeling requirement is an obvious and valuable regulation for both consumers and producers of content and computers. The benefit to consumers is obvious: they can avoid protected content if they have reason to be concerned that the technology used to protect the content might interfere with their machine.

But there is also a benefit to content producers and technologists: To the extent stories about harm caused by copy-protected technologies become more common, they will create an uncertainty among computer users. That will reduce the demand for CDs by those users. Eliminating that uncertainty will counteract that damping of demand. And likewise, producers of competing, but not-yet mainstream, technologies will not face the barrier to entry created by consumer fear—namely, that their technology might interact badly with copy-protected CDs. If there’s no way to know whether a CD will destroy data on a non-Windows based computer, that will, on the margin, make it less likely that one would purchase a non-Windows based computer.

Adding information into the market will thus improve competition within the market. And while in the short term, such labels may drive consumers away from copy-protected CDs, they will also create a strong incentive for CD manufacturers to support certifying organizations that can verify that the technologies cause no harm. The label would thus create an incentive for better cross-platform certification, which again would benefit consumers and competition generally.

(2) Non-infringing use exception from anti-circumvention regulation

The more controversial aspects of H.R. 107 are the portions aiming to exempt from DMCA liability technologies that circumvent copyright protection technologies for privileged uses. The bill both privileges circumvention if the underlying use of

⁹William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 120-21 (2003).

the copyrighted work would be privileged, and privileges technologies “capable of enabling significant non-infringing use of a copyrighted work.”

This correction to the DMCA is long overdue. It is necessitated first by the limited authority granted to Congress under the Copyright and Patent Clause. As the Supreme Court has repeatedly affirmed, Congress’s power under the Copyright & Patent Clause is limited. *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966) (clause “both a grant of power and a limitation”). As it has recently indicated in *Eldred v. Ashcroft*, among those limits is “fair use.” Slip Op. at 30. Yet the DMCA, as interpreted, plainly interferes with the effective exercise of “fair use.” And if Congress is restrained by the First Amendment to include “fair use” in the Copyright Act, it is constrained by the First Amendment not to exclude it through other copyright-related rules.

No doubt, content owners who rely upon copy-control technologies will worry that this exception will swallow the DMCA-rule: that by allowing technologies that, e.g., enable back-ups of DVDs, Congress will be allowing technologies that enable “piracy.” But there is absolutely no independent economic showing of harm caused by the ability to circumvent copy-protection technologies for non-infringing uses. It is possible, of course, that such an exception will create a problem in the future. But rather than destroying a tradition of consumer rights because of a fear, Congress should predicate additional legal regulation only upon an actual showing of harm from such technologies.

That showing, moreover, must be precisely focused upon the copyright related interest in controlling circumvention. The question of harm is whether the existence of a technology (a) cannibalized a market (by enabling some to get the content without paying for it) more than it (b) expanded the market (by making the underlying content more valuable). That harm must then be discounted by the constitutionally required “fair use” enabled by that technology.

OTHER NECESSARY STEPS

As I have indicated, this important legislation is just the first step in a series of actions that Congress should consider to assure that copyright law continues to function in the balanced way that is our tradition. In addition to this change, I would urge this Committee to recommend the establishment of a serious and balanced study, perhaps chaired by former Congressman Robert Kastenmeier, to consider fully how best to adjust the protections of copyright to the digital age. Kastenmeier’s tenure chairing the Subcommittee on Courts was defined by a constant appreciation of the balance the law needs to strike in light of changes in technology. A commission focused on precisely this sort of balance could provide a map for Congress in a range of areas.

Such a map would reveal, I suspect, the great value that could be produced by rules designed to re-formalize much of copyright law. One unintended consequence of Congress’s changes in the law in the 1976 Act was to eliminate many traditional copyright formalities. That in turn has massively increased the unproductive burden of copyright regulation—both making it more difficult to track down copyright owners, and extending copyright protection to works having no continuing copyright-related interest. Rules for more clearly identifying owners and content requiring protection would improve the creative process generally.

No doubt some of this work can be done by the private sector. I am Chairman of Creative Commons, <<http://creativecommons.org>>, a non-profit corporation that builds and gives away technologies that enable authors and creators to more simply signal the freedoms they intend to run with their content. Thus a musician can use these tools to signal her desire that others share her music for non-commercial purposes. Or an author may use these tools to signal his desire that others use his work for any purpose so long as attribution is given. As a recent feature article in *Business 2.0* describes,¹⁰ this strategy is increasingly used by artists and authors to enable their own commercial success, by lowering the transaction costs imposed by the law on the ability of others to reuse and share content.

I am proud of the work that Creative Commons has done to enable creators to make their work more easily available. And following a recent grant, I am eager to expand that work into the domain of science. But this work signals the need for a more extensive reconsideration about how copyright law currently functions. It is not a substitute.

¹⁰ Andy Raskin, *Giving it Away (For Fun and For Profit)*, *Business 2.0* (May 2004).

CONCLUSION

As the Supreme Court has indicated repeatedly, it is primarily Congress's job to "defin[e] the scope of the limited monopoly that should be granted to authors or to inventors."¹¹ But in executing that task, it is crucial that Congress not be captured by any single set of interests. While I believe historically that Congress has done a good job in balancing technologies and protection, there is an important and valid criticism made by many that Congress has crafted copyright policy to conform to the interests of current creators, while ignoring the interests of future creativity, and businesses that build on their work.

My concern is that this dynamic precisely is happening just now. In the heat of the debate about "piracy," I believe that Congress is losing sight of other important values. And in particular, in the burdensome regulations that have been enacted to fight "piracy," my concern is that a great deal of the potential commerce and creativity that digital technologies might enable will be lost.

Mr. STEARNS. I thank the gentleman.

Mr. Shapiro.

STATEMENT OF GARY J. SHAPIRO

Mr. SHAPIRO. Thank you, Mr. Chairman, members of the subcommittee. My name is Gary Shapiro and I'm President of the Consumer Electronics Association. It's a national trade association representing some 1500 companies, high tech companies. I'm also Chairman of the Home Recording Rights Coalition which has been before this committee and the Judiciary Committee many times over the last 20 years, always on the defense, always trying to say let's not expand the copyright laws further, they're broad enough.

We have failed most of those occasions, but I'm happy to be here today to urge you to restore some balance in the copyright laws and to report favorably H.R. 107.

Coming from the electronics industry, I have to say, believe it or not, intellectual property is also our life blood. Each year our members invent and create new technologies and they bring these products to the marketplace. But let me make things—one thing very clear. We favor vigorous enforcement of fair and balance IP laws. Indeed, our members do work closely with companies in the content communities to build technologies that protect content and safeguard reasonable and customary consumer expectations.

What has happened recently, however, is a radical departure from the balanced approach to copyright law that our Constitution calls for and our public interest indeed requires. Let me give you some examples of problems that Americans now face. Americans buy new copy protected CDs, totally unaware that they may not play in their personal computers or on their automobile CD players. Innovators are being blocked from bringing legitimate competitive products to the market, even where there is no exploitation of a copyrighted work. And indeed, it's gotten so serious that the funding for this type of products has dried up because the funders are in danger of being sued. Indeed, they have been sued under the DMCA.

Scientists have been threatened with prosecution if they publish their research on digital encryption issues and families are prohibited, as I'm sure many in this room have been frustrated, from fast-forwarding through the advertisements at the beginning of DVDs

¹¹ Sony, *supra*, 464 U.S., at 429.

that you bought and that you already own, but you must watch the advertisements.

H.R. 107 does take necessary steps to restore that balance that now leans so heavily against consumers, innovators and educators. Now 20 years ago Hollywood asked the Supreme Court in the Betamax case to ban a product, based on the presumption that its predominant use would be to infringe copyright. The Supreme Court refused to do so, thankfully by just one vote. It declared that such a rule would choke the wheels of commerce. And thankfully for us, our country and even Hollywood itself, the Supreme Court decision came.

Those principles need to be reaffirmed one more time when you mark up H.R. 107 because even today some argue that the freedom to innovate that the Betamax established should apply only to one product and that is the analog VCR and that it has absolutely no application at all in the digital age. Actually, I think the digital age the opposite is true. Consumers and innovators still need the Betamax protection and it should be strengthened, not weakened. Many of you have heard of or some of you have traveled to the International Consumer Electronics Show. It's the largest show in the country and there 2500 different companies show the latest and greatest products. Those products, many of them would not be shown there, those companies would not be in existence today, but for the Betamax holding. It's made a difference not only for these companies, but for the products that Americans now have in their living rooms or homes and their cars. They need the ability to get entertainment, information, educational content and be able to shift it around their home and use it anywhere. For the sake of technological growth, as well as the rights of consumers, we urge you to codify the Betamax decision, not narrow it, as was done with the DMCA.

H.R. 107 also confirms that individuals can unlock digital media they own and they would not be liable under the DMCA so long as they did not infringe underlying work. You've heard about that from the Congressman and Professor Lessig.

H.R. 107 also provides an exemption for activity solely in furtherance of scientific research and technological protection measures. This makes sense. The law should not be used as a selective sword and shield to invite comments from some corners and punish comments from others.

Finally, there is a warning label required on anti-copy CDs. The FTC has asked to be given jurisdiction to enforce this. The challenge we face, consumers buy a CD, they expect it to work in their products. When it doesn't work, they get very frustrated. They blame the manufacturer of the product. Their expectations are not being met.

Mr. Chairman, please let me make one final point. I understand that individuals representing the content industry have told this committee that H.R. 107 would somehow provide a haven for those who engage in piracy. This is absurd. H.R. 107 only authorizes consumers to circumvent a technological protection measure in those instances where they do not infringe a copyright. H.R. 107 takes away no intellectual property rights. It merely realigns the DMCA

with historic copyright law by ensuring that there can be no liability without copyright infringement liability.

Now after the Betamax and before the Betamax decision, throughout the last 20 years you've heard claims of doom and gloom over and over again. You've heard it before the DMCA. You heard it with the introduction of the VCR. You've heard it from the same people in this room. I urge you to go back to that testimony. When that DMCA was passed, what I called it then was "a bill named Sue." And that's what it has become. I urge you to take those claims, revisit them and to pass H.R. 107.

Thank you for your time.

[The prepared statement of Gary J. Shapiro follows:]

PREPARED STATEMENT OF GARY J. SHAPIRO, CHAIRMAN, THE HOME RECORDING RIGHTS COALITION

Mr. Chairman and Members of the Subcommittee: On behalf of the Home Recording Rights Coalition (HRRC), I thank you for inviting me to discuss H.R. 107, the "Digital Media Consumers" Rights Act of 2003."

This vital, bipartisan bill would restore some balance to a copyright system that has recently been tilted to elevate the interests of media giants over those of ordinary people.

We therefore urge you to favorably report H.R. 107, reverse this recent and harmful trend and restore the balanced copyright law that our nation has enjoyed for most of its history.

In addition to my Chairmanship of the HRRC, I am also President and CEO of the Consumer Electronics Association (CEA), the premiere association representing the American technology industry.

Intellectual property is our lifeblood. Each year, my members invent and introduce new and brilliant products into the marketplace. Innovation is the catalyst for growth in our industry. So let me make one thing clear: we hate piracy, and we hate pirates. We are all in favor of the vigorous enforcement of fair and balanced intellectual property laws.

What has happened recently, however, is a radical departure from the balanced approach that our Constitution calls for and our public interest requires.

Over the last few years, entertainment and media industry giants have persuaded Congress to restrict private and public use of books, music, and other material when it is in digital form.

And now they are working through the Courts to change the laws and limit our freedoms even further.

Many of these problems are a result of the 1998 enactment by Congress of the Digital Millennium Copyright Act or DMCA. The DMCA includes "anticircumvention provisions" intended by Congress to prevent copyright pirates from defeating anti-piracy protections on copyrighted works, or getting hold of "black box" devices used for this purpose.

Unfortunately, these anticircumvention provisions have proven overly broad, and are not being used as Congress intended. Instead of targeting pirates, they are being directed against consumers, as well as scientists, and business competitors engaged in a range of legal activities.

Here are some of the problems Americans face as a result of today's new unbalanced copyright environment:

- Consumers buy new "copy-protected" Compact Discs unaware they may not play in their PCs or automobile CD players.
- Innovators are blocked from bringing legitimate competitive products to the market, even where no exploitation of a copyrighted work is involved. Competitors eager to keep less expensive alternatives away from consumers have sued manufacturers of generic garage door openers and printer cartridges under the DMCA.
- Venture capitalists refuse to fund legal and innovative technologies for fear of DMCA lawsuits.
- Scientists have been threatened with prosecution if they publish their research on digital encryption issues.
- Families are prohibited from fast-forwarding through the advertisements at the beginning of DVDs that they bought and own.

- Libraries and universities are unsure of whether or how they can archive and use the digital materials they have acquired.
- Viewers who own HDTV television receivers may lose their viewing and recording rights because of the unilateral use of “down resolution” and “Selectable Output Controls”—by giant media companies.
- Americans’ fundamental rights to buy legal products such as VCRs and digital video recorders are in jeopardy as media giants have declared war on the Supreme Court’s landmark *Betamax* ruling.

H.R. 107 cannot and does not address all of these harms in a single bill. It does, however, take necessary steps to restore the balance that now leans so heavily against consumers, innovators, and educators. Here is what H.R. 107 would do:

1. H.R. 107 would re-affirm that the Supreme Court’s holding in the *Betamax* case is the law of the land;
2. H.R. 107 would protect consumers, inventors, educators, librarians, and product designers from prosecution or suit for “circumvention” unless their activity also infringes the copyrighted work in question;
3. H.R. 107 would protect legitimate research from being suppressed via suit under the DMCA; and
4. H.R. 107 would require explicit warning labels on “anti-copy CDs.”

Let me explain why, in our view, each of these areas needs to be addressed by the Congress.

First, H.R. 107 ensures that the Supreme Court’s *Betamax* decision will remain the law of the land. *Betamax* is the legal cornerstone of our industry’s ability to innovate and bring new products to consumers.

H.R. 107 provides:

“It shall not be a violation of this title to manufacture, distribute, or make noninfringing use of a hardware or software product capable of enabling significant noninfringing use of a copyrighted work.”

This provision embodies the Supreme Court’s classic formulation in its 1984 *Betamax* holding.

Media giants now are running a well-funded campaign to persuade the public, the Courts, and the Congress that the *Betamax* doctrine safeguarding all products having significant non-infringing uses should now be confined to *one* product—the analog VCR—and that it has no application in the digital age.

Actually, the opposite is true—in the digital age consumers and innovators need the *Betamax* protection to be strengthened, not weakened. Some of you have visited or heard of our annual International Consumer Electronics Show or CES. Without the *Betamax* holding, many of the products on display at CES would simply not exist. Indeed, many of the exciting new digital products American consumers are enjoying in their living rooms today would not exist.

Twenty years ago, Hollywood asked the Supreme Court in the *Betamax* case to ban a product from the marketplace, based on a projection that its predominant use would be to infringe copyright. The Supreme Court declined to do so. Instead, it ruled that so long as any significant non-infringing use of the product could be identified, the product deserved its place in the market.

We all know, now, that this decision allowed the creation of an entirely new market—home video—that no one had anticipated. Even in Hollywood’s record-setting box office year of 2003, home video generated significantly more revenue than theatrical releases.

But the *Betamax* decision unleashed more than a single new market. It represented a turning point in American cultural and economic life. The recording and processing power of devices, long available to industry, was just starting to become available on an affordable basis to consumers, educators, and libraries. This frightened some powerful groups. The litigation against the VCR was the first shot in their effort to keep this power out of the hands of consumers. The Supreme Court changed history by resisting this over-reaching offensive.

The plaintiff movie studios asked the Courts for nothing less than an *injunction*, to keep VCRs off the market, unless the copyright holder granted permission for the product to be marketed, and set the terms and conditions under which it might be configured and sold.

The Supreme Court refused to do this. The Court observed that, were it to do so, it would be including the innovative new product in somebody else’s existing monopoly. In the patent law, this would mean that a patentee would effectively gain monopoly control over any other product that might contribute to infringement of the patent.

The Court said that such a rule would “choke the wheels of commerce.” It said the same would be true in the case of a copyright owner asking for the power to keep a new device off the market. The Court said that such power should not be granted,

even if the *primary purpose* of the new device is to infringe copyright, so long as the device has a significant use that is non-infringing.

This outcome, in favor of a new consumer device coming to market without the necessity for a specific license from copyright owners, was not inevitable—it was the product of a vigorously argued, 5-4 decision. We can see now, with hindsight, that a contrary decision would probably have choked the wheels not only of commerce, but also of *e-commerce*. Without the establishment of *Betamax* principles, a number of common Internet applications—and perhaps the Internet itself—would have been vulnerable to legal challenge.

The *Betamax* principles must be affirmed when you mark up H.R. 107 because, even today, it is being argued that the freedom to innovate that was established therein should apply only very narrowly—that it was OK for analog products, but is simply too dangerous for digital products. That it was OK for hardware, but too dangerous for software. Such thinking in the digital era would be a serious blow to American technical leadership, as well as to the rights of consumers. These rights should be confirmed, not circumscribed any further.

Second, H.R. 107 would confirm that individuals “unlocking” digital media they own would not be liable under the DMCA so long as they did not infringe the underlying work. The bill would do so with the following language:

“It is not a violation of this section to circumvent a technological measure in connection with access to, or the use of, a work if such circumvention does not result in an infringement of the copyright in the work.”

One of the central failings of the DMCA is that it preserved fair use as a defense to copyright infringement, but more perniciously created the new crime of circumvention without a fair use defense. As a result, even if no infringement occurs when a consumer simply unlocks something he or she owns, he or she could be held liable under the DMCA. The Boucher-Doolittle bill would bring the two statutes into harmony by imposing liability under the DMCA only when it also exists under the Copyright Act.

American copyright law, unlike some in Europe, provides that those who purchase material have an unencumbered right to make private, personal or family *use* of it—such as simply watching or listening—with no obligation to the content owner. Yet the erosion of this important principle in the digital age has been profound.

Indeed, it would be hard to go out on the street today and find a consumer who is not a home entertainment “licensee” many times over, even if that consumer owns no recording device at all. The same could not have been said 50 years ago, or even 20 years ago, at the time that the *Betamax* case was decided.

The DMCA has severely and unnecessarily aggravated this situation. The consequences are extensive, and they range from the minor to the profound.

The DMCA, for example, makes it unlawful for a parent to “unlock” a DVD to fast-forward through the multiple ads at the beginning of it. This has nothing to do with protecting copyrighted material from reproduction or public display. Under the Copyright Act, a grade school child has a fair use right to record a short excerpt from a movie on VHS for use in a school project, but has no such right under the DMCA. The Boucher-Doolittle bill would rectify this situation by providing families with the same legal right under the DMCA.

But the problems go beyond the use of technology and media by families at home. It has now become routine for competitors to cite the DMCA in attempts to suppress competitive products.

When the DMCA was passed, what Member of Congress could have imagined that it would be used by companies to sue legitimate competitors marketing universal garage door openers or generic printer cartridges?

These competitors are not accused of infringing any intellectual property laws—not copyright, patent, trademarks, or trade secrets. The only offense they are accused of committing is reverse engineering—or “decyphering”—their competitors’ products for compatibility purposes, thus arguably violating the DMCA.

And in the future, we can expect to see more abuse of the DMCA to forestall legitimate competition. For example, CEA represents manufacturers of aftermarket consumer electronics for automobiles. If automobile manufacturers were to put “authentication chips” in their cars, makers of aftermarket products such as car stereos or car alarms could face suit for reverse engineering the chips merely to ensure compatibility of aftermarket products. The entire automobile aftermarket could disappear, courtesy of the DMCA.

And in a world where chips are becoming cheaper and more ubiquitous, you could apply that scenario to nearly any other industry. Just imagine the destructive effect on the economy and innovation. Surely this was not the intent of the DMCA.

In the unclear and hyper-litigious environment created by the DMCA, it is little wonder that venture capitalists are increasingly refusing to fund new and innova-

tive technologies. Due to the DMCA, technology companies now routinely pay for lawyers to sit in on product design meetings. We can only guess what extraordinary products today's consumers will never get to see because of the expense and litigation caused by the DMCA.

This situation cannot be allowed to stand. The impact on innovation and the economy will be increasingly severe and harmful. H.R. 107's remedy is to require a linkage between interference with a technical measure "protecting" a copyrighted work, and infringement of the copyright in the work.

Without this protection, a new and vague form of legal "protection" may be drummed up toward whatever advantage the proponent of a technological measure has in mind, resulting in the creation, unintended by the Congress, of a new and unmanageable form of industrial property protection. This is exactly what the Supreme Court said in the *Betamax* case that it needed to guard *against*—so as not to "choke" commerce.

I was one of several witnesses who warned of this potential consequence when the DMCA was pending; but back then we were not as creative as some lawyers have proven to be, so we could not dream up the range of abuses that have now come to pass.

I also must note, Mr. Chairman, the dedicated efforts of many companies in our industry to create content protection technologies that safeguard commonly accepted consumer fair use practices. Following Congress's lead, our industry has insisted that protection technologies be accompanied by "encoding rules" such as those in Section 1201(k) of the DMCA, that respect consumers' legitimate expectations in the recording of broadcast and subscription video content.

We do not anticipate that H.R. 107 will interfere with these efforts to create enforceable and more flexible DRM technologies. Notwithstanding, even the best of today's DRM technologies¹ and our companies constantly strive to improve them, because they do have an important place in the marketplace—can only approximate, but not fully accommodate, fair use.

So, in the interests of both families and innovators, the DMCA's lack of any tie to copyright infringement—indeed, its circumlocution in defining what it does protect—needs to be reformed. H.R. 107 provides a means to do so. I urge the Subcommittee to address itself to this task when it moves this legislation forward.

Third, H.R. 107 provides an exemption for activities "**solely in furtherance of scientific research into technological protection measures.**" The last few years have been full of instances where copyright holders attempted to silence and intimidate academic researchers by brandishing the DMCA—the case of Princeton Professor Ed Felton is perhaps the most notorious. It is now clear that the DMCA's existing provisions are too narrowly drafted to avoid the intimidation of scholars and researchers.¹

The HRRC has more than a decade's experience in working *with* content owners and distributors, to try to find balanced technical solutions that meet their needs, yet recognize and preserve the reasonable and customary practices and expectations of consumers.

HRRC is a charter participant in the Copy Protection Technical Working Group ("CPTWG"), which is now entering its *ninth year* of meetings that bring people together to discuss these issues in an open technical forum. One thing we have learned is that technical measures must be tested as to the reliability of intended outcomes, and vulnerability to unintended outcomes.

Public comment by researchers, both invited and uninvited, is vital. The DMCA should not be used as a selective sword and shield, to invite comment from some quarters but not from others.

Finally, H.R. 107 requires a **specific warning label on "anti-copy" CDs, with the Federal Trade Commission given jurisdiction to enforce compliance.** The emergence of common products, like a Compact Disc, that suddenly will not play back in common and clearly lawful products such as automotive players, boom boxes and PCs, illustrates a problem in the digital revolution that is little remarked on: as sophisticated as digital techniques may be, they are often very blunt instruments.

The primary "copy control" technique in the digital world is still to **deny access**. When access to the program material is denied, the user loses it not just for purposes of copying, but also for ordinary viewing and listening, as well.

The DMCA does not address this problem; it aggravates it. Except for section 1201(k), which addresses an analog technology, it provides no tools to enhance consumer use, yet new obstacles may be imposed unilaterally and without warning.

¹See, National Academy of Sciences, *The Digital Dilemma*, Appendix G (National Academy Press, 2000).

In the case of Compact Discs, some of the access denial measures are so crude—for example, simply introducing errors into the digital coding, so as to fool the types of circuitry used in some players—the HRRC does not regard them as “effective measures” under the DMCA at all.²

But whether or not circumvention is prohibited by the DMCA, the consumer who buys an ordinary Compact Disc that is copy-protected is buying a potential problem. The CD format has been stable for twenty years; consumers have invested in hundreds of millions of players, and in sound systems designed to work with those players.

Consumers are entitled to know when they are buying a disc that may not be playable, or that, if playable, the disc may not be used in the ways to which consumers have become accustomed. And they are entitled to know these things right away, at the store, before they bring their purchase home.

Some Members of this Committee will recall that the HRRC was involved in the negotiation and enactment of the Audio Home Recording Act of 1992 (AHRA), which was an effort to enact forward-looking legislation to deal with recording from Compact Discs in the digital age.

The AHRA imposed very specific technical and royalty obligations that are still in place on consumer electronics digital audio recorders and media, in exchange for some specific consumer protections. The music industry may now take a different view of its current needs and objectives, but we have not forgotten about the AHRA. Thus far, we are not aware that any of the technical restraints imposed on copy-protected CDs would infringe on the particular recording functions that the AHRA assures to consumers—but we will continue to be vigilant on this subject.

The Compact Disc labeling provisions protect consumers by ensuring that they know when they are being offered products that, as a result of added “copy protection” measures, might not play on some standard CD or DVD players and may not be recordable on a personal computer. Consumers have a right to know this. They have a right to know if the disc might not play on one of their products. They have a right to know whether they can make a home recording for private, noncommercial purposes, and if they can, what strings may now be attached to their ability to do so. Then they can make an informed choice.

Mr. Chairman, let me make one final point. I understand that individuals representing the entertainment industry have told this Committee that H.R. 107 would somehow provide a haven for those who engage in piracy. That is absurd.

H.R. 107 only authorizes consumers to circumvent a technological protection measure *in those instances where they do not infringe a copyright*. H.R. 107 takes away no intellectual property rights. It merely re-aligns the DMCA with historic copyright law by ensuring that there can be no DMCA liability without copyright infringement liability.

I understand that some also have accused this bill of undermining digital rights management copy protection systems. This too is absurd. Our industry recognizes and supports the need for reasonable measures to protect against widespread piracy such as those outlined in the so-called plug-and-play agreement reached between our industry and cable operators last year. We simply argue that these systems must be balanced against the equally important and well-established fair use and home recording rights of consumers.

Twenty years ago, the same entertainment representatives told you that the VCR would mean the death of the American movie industry. They were spectacularly wrong.

Now, they make the identical claim about the impact of H.R. 107. I believe history shows you have every good reason to be skeptical.

Clearly, Mr. Chairman, H.R. 107 addresses a number of pressing problems that were not specifically foreseen as recently as six years ago. As I said at the outset, H.R. 107 cannot address all of them, but it is a crucial start.

On behalf of the HRRC, and our efforts since 1981 to achieve balance in U.S. law, I urge this Subcommittee to work on these problems so as to enable fair use outcomes for consumers, and to move this legislation forward to the full Committee.

In the continuing copyright dialog between the Congress and the Courts, it is time for the Congress to restore a historic balance that protects consumers, researchers, educators, and librarians and allows consumer electronics manufacturers to continue to bring exciting, innovative and legal products to market. Thank you again for having invited us to participate today.

Mr. STEARNS. I thank the gentleman.

²See Schwartz and Turner, “When Is A Technological Measure Effective?” www.HRRC.org. See also, *id.*, pp. 9-10.

Mr. Valenti, welcome.

STATEMENT OF JACK VALENTI

Mr. VALENTI. Thank you, Mr. Chairman. First, I want to reply to my dear friend, Larry Lessig, who quoted me most eloquently and most persuasively, except there is scarcely a word that he said was true. The DMCA does not extol fair use. As a matter of fact, all of the catalog of fair use which you enunciated, Mr. Chairman, in your opening statement is very much intact in the DMCA today.

No. 2, to my dear friend, Gary Shapiro, let me point out I have a letter which I think has been delivered to this committee yesterday. I don't know how many of you have seen it. This letter is from the DVD CCA, Copy Control Association. Let me tell you who is in this Copy Control Association. The membership encompasses many small companies, as well as every major consumer electronic company in the world, all of whom are in Mr. Shapiro's association. Most of the major computer companies, virtually all electronic component manufacturers, all of them oppose 107 for the reasons that I'll give you today.

I want to make just four points, but I want to preface it with a question. I am very respectful of Members of Congress because you won public approval from your voters. I never have and nobody at this table except my dear friend, Al Swift, has. So every time you confront an issue in this Congress, you must ask yourself one question. What is the public interest in this bill? How is the national interest served by this? And then you vote accordingly.

Let me make four points. The first point is that the central flaw which is unfixable in 107 is that it legalizes hacking. Hacking is described as circumventing an encrypted device or computer or anything. That's what hacking is. It now legalizes it. And allows you to make a copy or many copies. And the thousandth copy of a DVD, Mr. Chairman, is as pure and pristine as the original. That's point one.

Point two and this is very, very important because it goes to the very core of what the proponents of H.R. 107 are saying. Right now, I want to quote from—well, first, when you break an encryption, there is no known technological device alive today that can restrict it to one copy. I know 321 is saying they can do that, but let me show you, Mr. Chairman. Here is an illegal copy of "The Runaway Jury." It was purchased by one of my associates in Chinatown, here in Washington. And when you play this DVD what comes up is this and I'm going to read you one line. It says "DVD backup. You are now viewing an archival backup copy of a DVD created solely for the private and personal use of the owner of the DVD." And by the way, we ask you to respect the rights of copyright holders which is the ultimately chutzpah, I might add. And it's from 321 Studios. So there's a classic every day real life example that you can't restrict it to one backup copy.

In a symposium held recently, Professor Samuelson, a distinguished member of the academic community that Professor Lessig knows very well, posed this question. Whether it is possible to develop technologies that would allow circumvention for fair uses without opening a Pandora's box so that allowing these technologies means you are essentially repealing the anti-circumven-

tion laws. The question was answered by one of the most influential and respected computer scientists in the world, Professor Ed Felton of Princeton. He said, "I think this is one of the most important technical questions surrounding DRM, digital rights management, today whether we know, whether we can figure out how to accommodate fair use and other lawful use without opening a big loophole. The answer, I think right now, is that we do not know how to do that."

When you take a 321 and you make a so-called backup copy of an encrypted DVD, Mr. Chairman, you strip away all the protected clothing of that DVD and now make it naked and alone to make a thousand or how many copies that you want.

Now point three and then I'm almost done here. I think it's important for Congress to understand what we're dealing with here. Intellectual property, computer software, music, movies, television, home video, represent America's greatest trade export price. We comprise more than 5 percent of the gross domestic product of this country. We bring in more international revenues than agriculture, than aircraft, than automobiles and auto parts, and most important, we are creating new jobs at three times the rate of the rest of the economy and these are not minimum wage jobs.

And finally, the movie industry alone has a surplus balance of trade with every single country in the world. I don't believe any other American enterprise could make that statement. And just today, I heard NPR say that we have now announced the largest deficit balance in payments in trade in our history.

So I'm saying to you the question is is it in the national interest to put to hazard the possibility of a shrinkage of this awesome engine of economic growth? That's the question that you have to answer.

Finally, we have striven, the computer software industry, the music industry and movies, home video and television, working with our government in bilateral trade agreements and in free trade agreements to make sure that other countries have the same resolve and the same copyright laws that protect our property over there which is anti-circumvention.

If we pass H.R. 107, every country in the world is going to say wait a minute, we better repeal all our laws. Why in the hell should we be protecting your property in our country where you don't protect them in your own?

So I'm saying to you, Mr. Chairman, fair use is alive and well, but no Court in the land and Mr. Lessig, Professor Lessig, I pray would approve of this, he may not, but the record is there. No Court in the land has to this hour said that copying an entire movie represents fair use.

I leave this in your hands, hoping that question is this in the national interest has to be answered and I thank you very, very much.

[The prepared statement of Jack Valenti follows:]

PREPARED STATEMENT OF JACK VALENTI, PRESIDENT AND CEO, MOTION PICTURE
ASSOCIATION OF AMERICA

WHY H.R. 107 IS A PRIME HAZARD TO THE FUTURE OF AMERICAN INTELLECTUAL
PROPERTY

1. H.R. 107 has one unfixable defect: It will legalize the hacking of copy protection measures, which in turn will make it impossible to truly protect valuable creative property.

We must remember that tapes copied on a VCR become progressively unwatchable after the first few generations. Not so in the digital format. The 1000th copy of a digital movie or piece of computer software is as pure and pristine as the original.

If H.R. 107 becomes law, it then becomes legal to sell machines that circumvent, or hack, the copy protections on a movie, whether distributed as a DVD or online, so long as the device is "capable of enabling significant noninfringing use of the copyright work." This would devastate the home sale market, as anyone could use these products to "rent, rip, and return" DVDs borrowed from video stores. In addition, it will greatly diminish the incentive for investment in new and innovative distribution mechanisms for digital content, such as distributing movies online. All legitimate digital distribution of movies depends on encryption and digital rights management technologies to control unbridled distribution. If breaking this encryption is legalized, why would movie studios invest in the infrastructure to deliver their products digitally when devices to strip the content of protection are legal and commonplace?

2. Keep in mind that, once copy protection is circumvented, there is no known technology that can limit the number of copies that can be produced from the original. In a recent symposium on the DMCA, Professor Samuelson of UC Berkeley posed the question: "whether it was possible to develop technologies that would allow...circumvention for fair uses without opening up the Pandora's Box so that allowing these technologies means that you're essentially repealing the anti-circumvention laws."

The question was answered by the prominent computer scientist and outspoken opponent of the DMCA, Professor Ed Felton of Princeton: "I think this is one of the most important technical questions surrounding DRM—whether we know, whether we can figure out how to accommodate fair use and other lawful use without opening up a big loophole. The answer, I think, right now, is that we don't know how to do that. Not effectively."

Moreover, there is no known device that can distinguish between a "fair use" circumvention and an infringing one. Allowing copy protection measures to be circumvented will inevitably result in allowing anyone to make hundreds of copies—thousands—thereby devastating the home video market for movies. Some 40 percent of all revenues to the movie studios come from home video. If this marketplace decays, it will cripple the ability of copyright owners to retrieve their investment, and result in fewer and less interesting choices at the movie theater.

3. It is important for the Congress to understand that intellectual property is America's greatest export prize which comprises more than five percent of the GDP—brings in more international revenues than agriculture, aircraft, automobiles and auto parts—and is creating NEW jobs at three times the rate of the rest of the economy. Why is it in the national interest to put to risk this engine of economic growth? Why?

4. Moreover if Congress creates this enormous loophole in the DMCA by passing H.R. 107, every nation in the world will immediately revise its own copyright rules to do the same. American intellectual property protections will be un-done, not only here but around the world. Why should other countries protect our property in their land if we don't do the same here?

5. H.R. 107 language was proposed in 1998 and was soundly defeated by the Congress.

My colleagues from the Business Software Alliance and the Recording Industry Association of America will elaborate on a number of these points. They will also talk about the "labelling" requirements proposed by the bill, and I want to make sure that the MPAA is clear that we support voluntary, not mandatory labelling. I want to focus the remainder of my testimony on one of the underlying issues driving this debate at this time: the issue of "back-up copies."

There are three reasons why the legislation to permit "backing up" DVDs is unsuitable for passage. Making back-up copies of DVDs:

- Is not legal.
- Is not necessary.

- And allows “hacking” of encrypted creative material, which in turn puts to peril the future home video market.

First, back-up copies are not legal. The Copyright Act does NOT say “buy one movie, get one free.” There is no more a “right” to a back-up copy of a DVD than a back-up DVD player, lawn mower or set of wine glasses. (Indeed, Congress included language in the DMCA that mandated that VCRs include technology to block the copying of prerecorded movies.) What H.R. 107 really says is “it’s okay to make extra copies, and it’s okay to circumvent encryption to do it.”

Second, and more fundamentally, back-up copies of DVDs are not necessary. As said earlier, an encrypted DVD is well nigh indestructible. Most people I know, and I include myself, take a favorite DVD with them when they travel. It is highly portable. Moreover, an encrypted DVD can be watched over and again, hundreds of times without any degrading of sight, sound and color. And if by some very rare happening a DVD should malfunction, another can be bought at ever-lowering prices.

Let’s remind ourselves about what has happened since 1998, when this proposal was last placed before—and rejected by—this Committee and the Congress. What has happened is the most immediately successful innovations in the history of how we as a nation enjoy audio-visual entertainment. The American consumer has adopted the encrypted DVD faster and more completely than any previous new consumer electronics product. This DVD revolution has been the key fact of life for making the American movie industry so hospitably received in countries all over the world.

The Copyright Office looked at this entire issue in great detail in last year’s DMCA rulemaking proceeding and, for the second time since the DMCA was enacted, denied an exemption for making backup copies of DVDs. Their analysis is correct. There’s no reason to reverse the course the Congress set in 1998: to bring the benefits of digital dissemination of copyrighted materials to the American consumer by encouraging the use of technological controls on access and use of those materials.

As you are aware, “321,” before being enjoined by two federal courts from carrying on its illegal business, was one of the leading purveyors of hacking technology targeting our DVDs. 321’s machines automatically labelled the copy of the DVD “for back-up use only.” Yet our investigators and law enforcement officials have found unauthorized copies with that very label being sold in the pirate marketplace.

We return to this one incontrovertible point: there is no way to know, at the moment that protection is stripped away, what use will be made of the resulting immaculate but unauthorized copy. Once the hacker has done his work, the protection is gone forever. The adverse impact of the hacking on the men and women who have invested their time, toil and talent to make the movie in question could be minimal—but it could equally be monumental. There is simply no way of telling in advance.

So let’s be frank about the impact of enacting H.R. 107. This is not just about facilitating back-up copies, illegal and unnecessary though they may be. It’s not even about enabling consumers to make their own extra copies, rather than to pay for them in the normal channels of commerce. It’s about opening a Pandora’s Box that our present technological capabilities are powerless to close.

Let me address one final point. This discussion has been about DVDs. But looming much larger is the issue of digital distribution.

Today our ability to digitally distribute movies legally—and the pirates’ ability to digitally distribute them illegally—is subject to limits of speed. But there are experiments now going on that will reshape and enlarge the ease and speed of delivery. Cal Tech reported one experiment called “FAST,” which can download a quality DVD movie in five seconds! Another experiment, “Internet-2,” has dispatched 6.7 gigabytes halfway around the world in one minute! (An uncompressed DVD-movie contains some 4.6 gigabytes.)

With this kind of lightning-fast speeds just around the corner, our dream and our plan is to develop digital distribution systems that will allow you to select and watch any movie ever made from the comfort of your own home. Consumer-friendly choices are promoted by providing consumers with legitimate market-driven alternatives for renting,—purchasing or even copying.— But these options will never come to pass if the circumvention of technology that provides these consumer choices is legalized by this legislation.

Development of these options all depend on copy protection—encryption schemes—and digital rights management to work. Under H.R. 107, someone will legally be able to develop, manufacture, sell, and use hacking tools. There is no point investing in expensive technologies to safely distribute our products digitally if we

know that in moments they will be stripped of their protection. If this bill is enacted, the digital dream will turn into a digital nightmare.

H.R. 107 is not just bad for copyright owners; it's bad for consumers. We urge that this bill be rejected.

[The letter from the DVD Copy Control Association follows:]

DVD COPY CONTROL ASSOCIATION
MORGAN HILL, CA
May 11, 2004

The Honorable CLIFF STEARNS
Chairman
Subcommittee on Commerce, Trade and Consumer Protection
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

DEAR CHAIRMAN STEARNS: The DVD Copy Control Association, Inc. ("DVD CCA") submits this letter with respect to the hearing to be held on May 12, 2004, by the Subcommittee on Commerce, Trade, and Consumer Protection ("Subcommittee") on H.R. 107, the Digital Media Consumers' Rights Act of 2003, and, more specifically, in relation to the comments made in the context of consideration of that legislation by representatives of 321 Studios, Inc. ("321").¹ We appreciate the opportunity to submit this letter for the record of the hearings on this legislation and provide it in advance of the hearings for the Subcommittee's use in conducting the May 12 hearing. To the extent that representatives of 321 make statements at the hearing that require our response, we anticipate sending a further communication to the Subcommittee.

We write as an association that has offered technology—the Content Scramble System ("CSS")—to protect against unauthorized consumer copying of DVD video content. The availability of our technology has been critical to making DVD videos available to consumers and making the DVD business the fastest growing consumer electronics business in history. Our technology has been found in multiple legal proceedings to be an effective technological measure protected by the anti-circumvention provisions of the Digital Millennium Copyright Act ("DMCA"). We urge the Subcommittee to avoid endorsing any legislative change that would undermine these DMCA protections for CSS technology or that would give 321 or others with similar DVD copying products any basis to argue that the DMCA's protections do not apply to CSS technology. Further, no suggestion or implication should be made that this Subcommittee or the Congress more generally endorses actions by 321 or others who would defeat CSS protections.

DVD CCA is a non-profit trade association composed of the over 261 licensees of CSS for the protection of DVD Video content against unauthorized access and use. CSS was developed and deployed beginning in 1996, in order to encourage the motion picture industry to put its highly valuable movie content on DVD Video discs and, thereby, facilitate the development of a new industry to provide high-quality, exciting products and content for the enjoyment of consumers. DVD CCA's membership encompasses many small companies, as well as every major consumer electronics company in the world, most major computer companies, virtually all electronic component manufacturers, and several major motion picture companies. The multi-industry governance structure of DVD CCA provides a carefully balanced decision-making process. The key governing bodies of DVD CCA—the board of directors, the Content Protection Advisory Council, and the functional categories of licensees—operate to ensure that all licensees participate in the critical decisions of the organization and that no one industry dominates the decision-making process.

The success of CSS in enabling the development of the DVD video business was already underway when Congress passed the DMCA in 1998. CSS was well-known to the Committees and Members of Congress who were making the decisions on the provisions of the legislation that became the DMCA. Indeed, CSS was widely understood to be precisely the kind of "effective technological measure" that was to be protected by the anti-circumvention provisions of the DMCA.

In addition, we have the following additional specific observations.

First, 321's products have made and, to our knowledge, continue to make use of DVD CCA's proprietary technology without license. For that reason, DVD

¹ See Jim Snyder, "Company Takes on MPAA Copyright Fights" The Hill, April 21, 2004, online version at http://www.thehill.com/business/042104_mpaa.aspx; Judy Sarasohn, "Special Interests" The Washington Post, April 29, 2004 at A23.

CCA has sued 321 for infringement of claims in two particular patents for CSS technology. We expect to prevail in that litigation later this year.

Second, the specifications, usage and compliance rules associated with CSS make clear that the technology and licensing system have been deployed to prevent consumer copying of the content that is protected using CSS. 321's products have been manufactured and distributed in direct violation of these rules. Indeed, 321 has clearly recognized this fact in that, (i) prior to DVD CCA's patent infringement suit against it, 321 never sought a license from DVD CCA to use the CSS technology; and (ii) in proceedings last year before the Copyright Office, it sought an exemption from the circumvention prohibitions of the DMCA for consumers using its technology to defeat the protections provided by CSS.

Third, to our knowledge, no court has ever found that making a complete copy of a copyrighted audio-visual work that is distributed in prerecorded packaged media form is "fair use" under the Copyright Act.

Last, in Section 1201(k) of the DMCA, Congress expressly permitted content owners to use technology ("Macrovision") to protect audio-visual works distributed in prerecorded packaged media format from being copied by consumers. That is precisely what CSS does in relation to CSS-protected video content distributed on prerecorded DVD discs.

In relation to the relatively few consumers who seek to defeat CSS and make copies of protected DVD movie content, DMCA's anti-circumvention provisions have been an important legal deterrent to the distribution of technologies to enable such copying. We believe that it is essential that the legal tools provided by the DMCA continue to be available for DVD CCA and those whose copyrighted content is protected using CSS.

Again, DVD CCA appreciates this opportunity to provide its views to the Subcommittee, and we look forward to working with you and your colleagues on these important issues in the future.

Respectfully submitted,

JOHN HOY

President, DVD Copy Control Association, Inc.

Mr. STEARNS. I ask you whether you would like to put the Copy Control Association's letter as part of the record, I'd be very glad to do that. I have this here. You were reading from it earlier.

Mr. VALENTI. Yes, I was. I presume there's no legal reason—the answer is yes.

Mr. STEARNS. By unanimous consent, so ordered. I think that will also be in your benefit.

Mr. Holleyman, welcome.

STATEMENT OF ROBERT W. HOLLEYMAN

Mr. HOLLEYMAN. Thank you, Mr. Chairman. Good morning to you and members of the subcommittee. I'm Robert Holleyman and I'm President and CEO of the Business Software Alliance. We're an association of the world's leading software companies and their principal hardware partners. Our members create approximately 90 percent of the office productivity software in use in the U.S. and around the world. Indeed, I would echo Mr. Valenti's commenting in noting that for the computer software industry, this is truly one of America's premiere industries and we too have a surplus balance of trade in productivity software with every country around the world.

I'd like to thank the subcommittee for the opportunity to testify today. As an industry, the software industry has a strong interest in effective, balanced approach to legal protections against the circumvention of encryption and other technologies that are used to protect copyrighted works.

We believe that a balanced, effective outcome was achieved 6 years ago when Congress with the substantial input of this com-

mittee, enacted the Digital Millennium Copyright Act. Our association therefore opposes H.R. 107 which we believe would fundamentally alter the effective balance of interest embodied in the DMCA.

I'd like to make a couple of quick comments about the provisions of the bill dealing with labeling certain audio CDs. Although directed specifically at the music industry, it touches on a broader issue of mandatory labeling for all content. For our industry in software, we've been voluntarily labeling our products for 20 years. Our companies believe that the public should know information about things such as playability and systems requirements and that it's essential to satisfied customers and is a good business practice. But we label our products because it's the right thing to do, not because we've been mandated to do that. And we think that remains the best approach and the right model for other industries.

I'd like to address the provisions of the bill dealing with the research exception. H.R. 107 would create a broad scientific research exception. We view this as unnecessarily and dangerously over broad. Our members are in the business of building secure computing. The advancement of the art of on is the life blood of not only our industry but the life blood of many of the specific core businesses of our members. At the time Congress enacted the DMCA, BSA was a leading proponent of the encryption research exception. And it is the real world experience of our member companies that this provision has worked as intended. We welcome Congress' continued monitoring of the provision, but at this time we are aware of no evidence that the DMCA stood in the way of the advancement of legitimate encryption technology.

Even if changes were made, we feel that there needs to be a balance and what we need to do is ensure that we do not shield the type of activity of hacking activity that 1201 was designed to prohibit.

Let me specifically address the issue of non-infringing use in H.R. 107. It creates a new non-infringing use exception to the DMCA. This is precisely the same provision that Congress rejected in 1998 and this subcommittee should reject now. When the subcommittee considered the DMCA in 1998, it responded to concerns about potential adverse effects of the legislation by creating a fail-safe mechanism and that mechanism was put into place by this committee. Congress directed NTIA and the Copyright Office to conduct a rulemaking every 3 years. That process has worked well in both 2000 and most recently in October of 2003. We believe that that is the most effective means of addressing this issue.

The central problem we have with the overall proposal is that it would allow any device that can circumvent a technological measure for a non-infringing use to also be used as a means to circumvent for purposes of piracy. H.R. 107 would effectively leave no circumvention device subject to the DMCA. In the long term, this would create a huge disincentive for our industry to develop measures to protect digital content.

In the short term, broad availability of circumvention tools will lead to an increase in software piracy. Our industry is suffering from nearly \$13 billion annual losses due to software piracy of which \$2 billion of those are in the U.S. One key element of our company's efforts to prevent those losses is the use of new product

activation and other access control technologies that are simple, consumer friendly and they help ensure that each copy of software is properly licensed. These simple, easy to use tools would be directly stymied by the broad availability of circumvention products that H.R. 107 would make legal.

As a result, it would require great reliance on litigation to protect our rights and also greater reliance on government resources in the fight against piracy. Congress had a goal in 1998 to encourage the development of activation and other technologies to make it possible for the promise of the internet, as a distribution channel, to become a reality. We share that goal. In the 6 years since the DMCA was enacted, more software and other copyrighted works are available to more consumers in a greater variety of ways than ever before. This progress should be allowed to continue.

Thank you for the opportunity to testify.

[The prepared statement of Robert W. Holleyman follows:]

PREPARED STATEMENT OF ROBERT HOLLEYMAN, PRESIDENT AND CEO, BUSINESS SOFTWARE ALLIANCE

Good morning. My name is Robert Holleyman. I am the President and CEO of the Business Software Alliance.¹ The Business Software Alliance is an association of the world's leading software companies. BSA's members create approximately 90% of the office productivity software in use in the U.S. and around the world.

I thank the subcommittee for the opportunity to testify here today. The software industry has a strong interest in an effective and balanced approach to legal protections against the circumvention of encryption and other technologies that are used to protect copyrighted works. We believe that a balanced and effective outcome was achieved six years ago when Congress, with the substantial input and leadership of the House Commerce Committee, enacted the Digital Millennium Copyright Act. Our industry therefore opposes H.R. 107, which we believe would fundamentally alter the effective balance of interests embodied in the DMCA.

Labeling Requirements

Before discussing section 5 of the bill, I would like to make a few comments on the provisions of the bill concerning the labeling of certain audio CDs. Although this provision is directed specifically to the music industry, it touches on the broader issue of mandatory labeling for the entire range of content.

The software industry has been labeling its products for twenty years. Our companies believe that informing the public about such matters as playability and system requirements is essential to keeping satisfied customers and a good business practice. The industry labels its products because it is the right thing to do—not because government regulators have mandated it.

We believe that this is an appropriate model for the content industries generally. Vendors should inform the public about playability and related matters, and they should do it voluntarily. Government mandates should be avoided as long as market forces are working. As technological progress drives innovation on how systems operate, and how DRMs are used, labeling requirements must also change to reflect these developments. We fear that mandated labeling may well delay prompt action by companies to keep consumers informed.

Research Exception

Section 5 (a) of the bill would exempt from the DMCA's antitrafficking provisions anything that is done "solely in furtherance of scientific research into techno-

¹ The Business Software Alliance (www.bsa.org) is the foremost organization dedicated to promoting a safe and legal digital world. BSA is the voice of the world's commercial software industry and its hardware partners before governments and in the international marketplace. Its members represent one of the fastest growing industries in the world. BSA programs foster technology innovation through education and policy initiatives that promote copyright protection, cyber security, trade and e-commerce. BSA members include Adobe, Apple, Autodesk, Avid, Bentley Systems, Borland, Cisco Systems, CNC Software/Mastercam, HP, IBM, Intel, Internet Security Systems, Macromedia, Microsoft, Network Associates, RSA Security, SolidWorks, Sybase, Symantec, UGS PLM Solutions and VERITAS Software.

logical protection measures.” We view this exception as unnecessary and dangerously overbroad.

BSA’s member companies are the industry leaders in the business of secure computing. They engage routinely in encryption research in the course of developing their products. The advancement of the state of the art of encryption is the lifeblood of this segment of our industry.

At the time Congress enacted the DMCA, BSA was a leading proponent of the encryption research exception that is embodied in section 1201(g) of the DMCA. This exception was calibrated by Congress to ensure that encryption technology could advance unimpeded, while avoiding the trap of creating a safe harbor for bad actors. It is the real world experience of our member companies that this provision has worked as intended: the science of encryption continues to evolve rapidly. This scientific progress continues to yield new and better technologies. These technologies make an essential contribution to our national security and economic welfare, especially in the current heightened security environment.

If section 1201 were to have an adverse effect on encryption research our industry would be among the first seeking changes to the encryption research exception. We welcome Congress’ continued monitoring of this provision. We are aware of no evidence that section 1201 has stood in the way of the advancement of the state of the art in encryption or other protective technologies. To the contrary, the proliferation of these technologies in the marketplace attests that the opposite is true. No change is needed at this time.

Even if change were necessary, the exception proposed in section 5(a) is overbroad. The existing exception in section 1201(g) is narrow, focused, and clearly-defined as to the scope of permitted conduct and the parties who are eligible. By contrast, section 5(a) of the bill proposes an exception in very broad terms. It would create a substantial danger of shielding, not legitimate research, but the very activity that section 1201 was designed to prohibit.

Exceptions for Noninfringing Use

Section 5(b) of the bill would create two new exceptions to section 1201. First, it would exempt any act of circumvention unless it results in a copyright infringement. Second, it would exempt the manufacture and distribution of circumvention tools that are capable of enabling “significant noninfringing use of a copyrighted work.” Together, these exceptions would swallow the rule; they would effectively nullify section 1201. Congress rejected this proposal in 1998, and this subcommittee should reject it now.

When this subcommittee considered the DMCA in 1998, it heard a great deal of concern about the potential adverse effects that the anticircumvention provision might have on noninfringing uses of copyrighted works. Through the leadership of this Committee, Congress responded to this concern by creating a failsafe mechanism which directs NTIA and the Copyright Office to conduct a rulemaking every three years to determine whether there is, or is likely to be any adverse impact on the ability of people to engage in noninfringing uses of copyrighted works. After examining the evidence, these agencies report their findings and recommendations to the Librarian of Congress, who is empowered to create exceptions to permit those specific noninfringing uses.

This process has now taken place twice—in 2000 and just six months ago in October 2003. Each time, an entire year was consumed in evidence-gathering and deliberation. Hearings were held in Washington and in other cities across the country. Multiple rounds of written comments were accepted and considered. At the end of the process exceptions were adopted to address specific instances where the evidence supported a conclusion that section 1201 was, or was likely to impede noninfringing use of copyrighted works.

I would like to offer four observations about this rulemaking process:

First, the process has functioned exactly as Congress intended it to function. Where there have been claims that section 1201 is adversely affecting noninfringing use, and those claims are supported by evidence, the rulemaking has resulted in the creation of new exceptions. In the most recent rulemaking NTIA and the Copyright Office recommended four specific exceptions, and those exceptions were adopted by the Librarian.

Second, the rulemaking process crafted by this Committee is a far better mechanism for addressing the question of noninfringing use than the categorical exemption proposed in H.R. 107. It can rectify specific instances where the protections of section 1201 are having an undesired effect, in a precise, focused way. It does so without the same degree of risk as a broad, one-size-fits-all exemption.

Third, the existence and proper functioning of the rulemaking process renders a broad noninfringing use exception unnecessary. With a working safety valve in place, there is no need to open the floodgates.

Fourth, and finally, variations of the broad noninfringing use exception proposed in H.R. 107 were proffered in both rulemakings. In 2000, and again six months ago, these proposals were rejected for lack of evidence. Nowhere in the voluminous record of the year-long proceeding was there sufficient factual support to recommend a general noninfringing use exception.

Not only is section 5(b) of the bill unnecessary, but we believe it would be extremely harmful.

Removing the technological protections from a work in digital form, even if it's done for a noninfringing purpose, leaves the work vulnerable to infringing use.

This problem is magnified many times if the means to remove technological protections are permitted into the stream of commerce. H.R. 107 would allow any device than can circumvent a technological measure for a noninfringing use. But circumvention devices cannot distinguish between infringing and noninfringing use. That is the conclusion reached by Professor Edward Felten, a computer scientist at Princeton and a vocal opponent of the DMCA, when questioned at conference at Berkeley last year.

Consequently, any device that can circumvent a technological measure for a non-infringing use can also be used to circumvent in order to infringe. By the same token, any device that can circumvent to enable infringing use, can also enable non-infringing use. In effect, then, no circumvention device would remain subject to section 1201's prohibitions.

In the long term, this would create a huge disincentive for our industry to develop the technological protection measures that content providers need in order to make their intellectual property available in digital form on the Internet. Ultimately that would reduce the quantity and variety of materials available in that form.

In the short term, broad availability of circumvention tools will lead to copyright piracy. Each of the copyright industries suffers from this problem today. Each is looking to a variety of technologies to make infringing use more difficult, and legitimate use easier.

The software industry lost nearly \$2 billion to piracy in the U.S. and more than \$13 billion worldwide in 2002. Most of these losses were due to unauthorized copying of software in a business setting. One of the key elements of our companies' efforts to prevent these losses is the use of product activation and other access-control technologies to ensure that each working copy of their software in the workplace is licensed and paid for. These simple self-help efforts would be stymied by the broad availability of circumvention tools that H.R. 107 would make legal. H.R. 107 would increase our reliance upon litigation and governmental resources to reduce piracy.

Congress' goal in 1998 was to encourage the development of activation and other technologies to make it possible for the promise of the Internet as a distribution channel to become a reality. We share that goal. In the six years since the DMCA was enacted, more copyrighted works have become available to more consumers in a greater variety of ways than ever before. This progress should be allowed to continue.

Thank you, Mr. Chairman, for inviting me to testify today. I'd be happy to answer any questions the Members of the subcommittee may have.

Mr. STEARNS. I thank the gentleman. Welcome our former colleague, the Honorable Al Swift and I had the opportunity to serve with you before you retired.

STATEMENT OF HON. AL SWIFT

Mr. SWIFT. Thank you very much. It's good to be back in this room. It's even better to be on this side of the dais. I get my weekends with my family.

Before I was in Congress, I was a broadcaster. I was a disk jockey so long ago that we didn't even shout at our listeners in those days.

Today, I'm a lobbyist with the firm of Colling Murphy Swift Hynes Seldridge. Our firm has no client on any side of this issue. I am testifying as an interested private citizen with a background

in communications. I had great interest in these matters when I was on the committee and I continue that interest today.

I think I was in my first year of high school when I bought with money that I earned working at a hardware store after school my first tape machine. It was a reel to reel machine. It was supposed to be portable although it weighed a ton and all I had to record on to it was 78 rpm records, the 45 wasn't distributed generally until I was in college. As near as I can figure, I've been home recordist for 54 years. In that time, I have given friends many tapes, cassettes and now CDs containing programs, collections that I create out of my own collection of CDs and LPs. In that time, I have never once made a straight duplicate of a record for anyone. If they asked me, I politely tell them where the nearest record store it. And in that time, I have never charged a person a penny, even for the cost of the raw cassette or the CD blank. This is just my hobby.

Furthermore, I respect our copyright laws. I don't believe that anyone should be allowed to use copyrighted material for profit without appropriate permission, license and payment. I think the industry is right to protect itself against piracy. But one of the things I noticed serving in Congress on this committee is that some people have a remarkable ability to carry a good idea to a bad extreme. Look at the history of the recording industry. They have always distrusted new technology. If Hollywood had been given its way with videotapes and DVDs, two things from which they now earn a huge portion of their profits, those technologies would have been smothered in their bassinet.

And the industry, in an effort to prevent pirates from duplicating their products have persuaded Congress to adopt statutes that prevent home recordists like me and millions of others who aren't quite as fixated on it as I am, from making duplicates without severe restrictions. If you want to make a copy for your car and one for your wife's car, and one for the boat and one for the cab and one for the playroom downstairs, that's hard to do because of technical restrictions the industry wanted and Congress gave them.

When I buy a CD or a DVD, that content should be wholly mine to do with as I please so long as I am in no way selling its content or profiting from it. As for equipment, I recently bought a dual CD burner that was touted as being able to make copies in a quarter of the time, 15 minutes instead of an hour. I installed it and tried to make a quick copy of one of the CDs that I had produced. It wouldn't do it. I called the company to ask what I was doing wrong and I was told that under the law they cannot let me fast duplicate anything except original recordings. Now when that happens someone put their hand in my pocket and took money away from me and justified it on the basis that they were protecting themselves from theft.

Furthermore, the present statute does not grant the American consumer what anyone brought up on a criminal charge is entitled to, namely, the presumption of innocence. Present law is predicated on the assumption that consumers will rip off copyright holders. The vast majority of the consumers are innocent of that assumption, but all are treated as guilty. Congressmen Boucher and Doolittle have offered a sound and modest correction.

Modern technology clearly poses real problems for protecting intellectual property in the traditional ways. It is unclear, at least to me, how we can make the transition to a different form of protection that solves the problems that technology has created, but taking hammers to the weaving machines did not save the looms at the beginning of the Industrial Age. And taking a hammer to consumers now will not in the end resolve this matter either.

So I would comment H.R. 107 to this committee. This is a clear opportunity to draw a balance between protecting the legitimate copyright interests of the industry involved and the legitimate rights of the average American consumer who, let us remember, is not in the wholesale pirating business. Others do that. The American consumer is no threat to these industries. Instead, they are the industries' source of wealth. I own 3,000 CDs. At an average price of say conservatively \$13 each, you do the math. You will find not only that my hobby spending is entirely out of control, you will find that I am, like other American consumers, a profit setter for these businesses and it's about time they treated us with a little respect.

Thank you very much.

[The prepared statement of Hon. Al Swift follows:]

PREPARED STATEMENT OF HON. AL SWIFT

My name is Al Swift. I spent sixteen rewarding, and I hope productive years, serving on this Committee. It is good to be back in this room, even if only for a little while. Before Congress I was a broadcaster. I was a disc jockey so long ago we did not even yell at our listeners. Today I am a lobbyist for the firm of Colling Murphy Swift Hynes Selfridge. Our firm has no clients on any side of the issue in question today. I am testifying as an informed private citizen, with a background in communications. I had a great interest in these matters while on the Committee and continue that interest today.

I think I was in my first year of high school when I bought—with money I earned after school working in a hardware store—my first tape machine. It was a reel-to-reel machine. It was supposed to be a portable, but it weighed a ton. And all I had to record onto it were 78 rpm records. The 45 didn't show up until I was in college. I've been a home recordist for about 54 years. In that time, I have given friends many tapes, cassettes and now CDs containing "programs" I have created from my own collection of LPs and CDs. In that time, I have never made a straight duplicate of a record for anyone. If they ask me to, I tell them politely how easy it is to buy it on the Internet. In that time I have never charged a person a penny—even for the cost of the raw cassette or CD blank. It is just my hobby.

I respect our copyright laws. I do not believe that anyone should be allowed to use copyrighted material for profit without appropriate permission, license and payment. I think the industry is right to protect itself against piracy.

But, one of the things I noticed serving in Congress on this Committee is that some people have a remarkable ability to carry a good idea to a bad extreme. Look at the history of the recording industries. They have always distrusted new technology. If Hollywood had been given its way the video tapes and DVDs, from which they now make a great percentage of their profits, would have been smothered in their bassinettes. This Committee reported out a perfectly absurd bill that—the industry claimed—was essential to prevent the Digital Audio Tape (DAT) machines from destroying the recording industry. Now you can hardly find a DAT machine—except for commercial purposes.

And the industry—in an effort to prevent pirates from duplicating their products—have persuaded Congress to adopt statutes that prevent home recordists like me—and millions who are not quite so fixated on the process as I am—from making duplicates without severe restrictions. If you want to make a copy for your car and one for your wife's and one for the boat and another for the cabin—that is hard to do because of technical restrictions the industry wanted and Congress gave to them.

When I buy a CD or a DVD, that content should be wholly mine to do with as I please as long as I am in no way selling its contents or profiting from it. As for equipment: I recently bought a dual CD burner that was touted as making a copy

in a quarter of real time—in 15 minutes instead of one hour. I installed it and tried to make a quick copy of one of the CDs I had produced. It wouldn't do it. Calling the company to ask what I was doing wrong, I was told that I was doing nothing wrong. Under the law, they could not let me fast-duplicate anything except an original recording. *Someone had just put their hand in my pocket and taken some money from me—all in the name of protecting themselves from theft.*

That is not a fair resolution of their problem. What the recording industries apparently want is so broad that it goes way beyond their legitimate interests and intrudes well into the legitimate interests of millions of consumers. In America we do not normally right a wrong for one group by transferring the wrong to another group. But that is what has happened on this issue.

Furthermore, the present statute does not grant the American consumer what anyone brought up on a criminal charge is entitled to: the presumption of innocence. Present law is predicated on the assumption that consumers will rip-off copyright holders. The vast majority are innocent of that assumption, but *all* are treated as guilty.

Congressmen Boucher and Doolittle have offered a sound and modest correction. I say "modest" because I would be inclined to go further. But this bill is no doubt more prudent than I would be and—in the long run—prudence usually produces better law.

Modern technology clearly poses real problems for protecting intellectual property in the traditional ways. It is unclear how we can make the transition to a different form of protection that solves the problems technology has created. But taking hammers to the weaving machines did not save the looms at the beginning of the industrial age. And statutes that hammer the consumer now, will, in the end, not resolve this matter. In fact, I would be willing to bet that—at this very moment—someone is developing technological innovation that will make the legal strictures now in place useless to the proponents as well as irritating to the consumers.

So I would commend this bill to this Committee. This is a clear opportunity to draw a balance between protecting the legitimate copyright interests of the industries involved and the legitimate rights of the average American consumer—who, let us remember, is not in the wholesale pirating business. Others do that. The American consumer is no threat to these industries. Instead, they are the industries' source of wealth. I own 3,000 CDs at an average price of say—conservatively—\$13 each. You do the math. You will find not only that my hobby spending is out of control. You will also find that I am—like other American consumers—a profit center for these businesses. It is about time they treated us with a little respect.

Mr. STEARNS. I thank my colleague.

Ms. Nisbet, welcome.

STATEMENT OF MIRIAM M. NISBET

Ms. NISBET. Good morning. Thank you. My name is Miriam Nisbet and I speak today for the library community. Collectively, our five associations represent over 85,000 librarians and thousands of libraries across the country. As one of the largest, single consumer groups of digital products, probably about \$2 billion a year, we urge you to support H.R. 107.

Libraries play a critical role in our country, serving as access points to their collections and services and as preservers of current and historical information. Our country's copyright law traditionally has aimed for a balance that accommodates both the ability of the country's copyright exploit his or her work commercially and the societal need to use those works for education, research, and public knowledge. Accordingly, the law provides that in some circumstances there are some uses of copyrighted works that do not require a permission slip from the copyright owner.

These statutory provisions besides fair use, include First Sale, which allows us to lend books in our collections; special library exceptions, which permit copying of copyrighted works by libraries for preservation and inter-library loan purposes; the TEACH Act, which permits limited performances or displays by non-profit edu-

cational institutions for distance education over the internet, for example.

When Congress passed the DMCA in 1998, it provided additional protections for copyright owners, but as others have vividly described, it omitted corresponding allowances for fair use and these other exceptions. Libraries believe that H.R. 107 is needed to restore a proper balance in copyright law between the rights of copyright users and the rights of copyright owners, a balance that is essential to the future conduct of research and education in the digital age.

Let me give you just a few examples:

H.R. 107 would make it possible for libraries to go around copy protection mechanisms in DVDs or CD-ROMs to make a copy for preservation or archiving. Remember that libraries and archives must be able to make such preservation copies well into the future, as digital storage formats become obsolete. Preservation of knowledge is a core mission of libraries.

H.R. 107 would permit foreign language teachers to circumvent technological access controls so that digital works purchased abroad can be used on electronic devices purchased in this country.

H.R. 107 would enable a librarian to unlock a technological measure, to make a copy of a work for inter-library loan purposes, something that all of you have probably used from time to time.

None of these activities are currently allowed under the DMCA, yet each of the examples involves a copy paid for by a library and a use otherwise permitted under the Copyright Act. And since many library and educational institutions are publicly funded, these examples demonstrate that H.R. 107 would allow taxpayers to receive the full benefit of their significant investment in copyrighted products.

The DMCA does include an exemption to its prohibition on circumventing a technological work—a technological lock on a copyrighted work, but unfortunately, this exemption in Section 1201(d) directed at nonprofit libraries, archives and educational institutions has proved to be meaningless.

The DMCA also includes a rulemaking procedure by which the Librarian of Congress, every 3 years, can adopt additional exceptions. The library community has actively participated in the two rulemaking cycles so far, but the statutory standards have been interpreted in such a way as to ensure the denial of almost all of the exemptions requested. Further, while the statutory scheme of the exemption process may permit exemptions for acts of circumvention, it does not permit exemptions for the manufacture and distribution of circumvention tools. Thus, you may obtain an exemption, but you will not be able to obtain a tool that allows you to use the exemption.

In sum, the DMCA is broken and it needs to be fixed. Libraries fear that they are spending hundreds of millions, if not billions of dollars a year for products that they might not be able to use. They worry that they may not be able to share those products fully with the millions of patrons for whom they were bought. They worry that they are unable, through restrictions in law and through technological measures, to make preservation copies of their digital resources. Some fear that the law combined with technological locks

will lead to “pay per view” as the way of the future, that “metered use” will be imposed upon all digital materials. Such a scenario is not acceptable in a society such as ours, which is founded upon the principle that “information is the currency of democracy.”

Thank you.

[The prepared statement of Miriam M. Nisbet follows:]

PREPARED STATEMENT OF MIRIAM M. NISBET, LEGISLATIVE COUNSEL, AMERICAN LIBRARY ASSOCIATION ON BEHALF OF THE AMERICAN ASSOCIATION OF LAW LIBRARIES, AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF RESEARCH LIBRARIES, MEDICAL LIBRARY ASSOCIATION, AND SPECIAL LIBRARIES ASSOCIATION

I am speaking today on behalf of the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Medical Library Association and the Special Libraries Association. Collectively, our five national associations represent over 85,000 librarians and thousands of libraries across the country. Our Nation’s libraries spend hundreds of millions of dollars each year on all forms of digital information and thus rank as one of the largest single consumer groups of digital products. We urge you to support HR 107, the Digital Media Consumers’ Rights Act.

Libraries have played and continue to play a critical role in our country, serving as access points to their collections and services and as preservers of current and historical information. Our country’s copyright law traditionally has aimed for a balance that accommodates both the ability of the copyright owner to exploit his or her works commercially and the societal need to use those works for education, research, and public knowledge. Accordingly, there are some circumstances where the law provides for certain uses of copyrighted works without permission from the copyright holder.

These provisions—for libraries and schools—include:

- Fair Use, which allows us—or anyone—to copy portions of works for teaching, criticism, and reporting.
- First Sale, which allows us to lend books in our collections to patrons. Special library exceptions, which permit copying of copyrighted works by libraries for preservation and inter-library loan purposes.
- The TEACH Act, which permits limited performances or displays by non-profit educational institutions for distance education.

These statutory provisions reflect two fundamental values that underlie our copyright system: fairness and freedom. Fairness, in that a person who buys a copy of work should be able to use the work fully; and freedom, in that the freedom of expression protected by the First Amendment can exist only if copyright does not shackle the dissemination of information.

When Congress passed the Digital Millennium Copyright Act in 1998, it provided additional protections for copyright owners, but it omitted corresponding allowances for fair use and other exceptions. Professor Peter Jaszi in his testimony today has vividly described the effects of these legal changes. Libraries believe that the Digital Media Consumers’ Rights Act is needed to redress those changes—to restore a proper balance in copyright law between the rights of copyright users and the rights of copyright owners—a balance that is essential to the future conduct of research and education in the digital age.

Let me give you just a few examples:

H.R. 107 would make it possible for libraries to go around copy protection mechanisms in DVDs or CD-ROMs to make a copy for preservation or archiving. Remember that libraries and archives must be able to make such preservation copies well into the future, as digital storage formats become obsolete. Preservation of knowledge is a core mission of libraries.

H.R. 107 would permit foreign language teachers to circumvent technological access controls so that digital works purchased abroad can be played on electronic devices purchased in this country.

H.R. 107 would allow a university professor to bypass a digital lock on an e-book so that she can perform a computerized content analysis on the text.

H.R. 107 would enable a librarian to unlock a technological measure to make a copy for a library patron or for inter-library loan or electronic reserve purposes.

Significantly, each of the examples involves a copy paid for by a library and a use otherwise permitted by the Copyright Act. And since many library and educational institutions are publicly funded, these examples demonstrate that H.R. 107 would allow taxpayers to receive the full benefit of their significant investment in copyrighted products.

The DMCA does include an exemption, 17 U.S.C. Section 1201(d), directed at non-profit libraries, archives, and educational institutions. Unfortunately, this exemption is so narrow as to be meaningless. It allows a library to circumvent a technological access control for the sole purpose of determining whether the library wants to acquire a copy of the work. The library and educational community never identified this as a problem and never requested this exemption. I suspect that it was inserted for the purpose of permitting certain proponents of the DMCA to argue that library concerns had been addressed.

Further, the DMCA includes a rulemaking procedure by which the Librarian of Congress, every three years, can adopt additional exceptions to the anti-circumvention provision. The library community has actively participated in the two rule-making cycles, and concurs with all the problems identified by Professor Jaszi in his testimony. The Copyright Office, charged with recommending the exemptions to be adopted, has interpreted and applied the standards set forth in the statute so narrowly as to ensure the denial of almost all the exemptions requested. The Copyright Office places on the proponents of an exemption a far heavier evidentiary burden than Congress required of the proponents of the DMCA prior to its enactment. Further, the statutory scheme of the exemption process is flawed because while it permits exemptions for acts of circumvention, it does not permit exemptions for the manufacture and distribution of circumvention tools. Thus, even if a person obtains an exemption, he or she will not be able to obtain a tool that allows the exemption to be used. The rulemaking procedure is impractical and ineffective.

In sum, the DMCA is broken, and it needs to be fixed. Libraries fear that they are spending hundreds of millions of dollars a year for products that they might not be able to use. They worry that they may not be able to share those products fully with the millions of patrons for whom they were bought. They worry that they are unable, through restrictions in law and through technological measures, to make preservation copies of their digital resources. Moreover, some fear that the law combined with technological locks will lead to "pay per view" as the way of the future, that "metered use" will be imposed upon all digital materials, that the "digital divide" will widen even more. Such a scenario is not acceptable in a society such as ours, which is founded upon the principle that "information is the currency of democracy."

The American Association of Law Libraries (AALL) is a nonprofit educational organization with over 5,000 members nationwide. AALL's mission is to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information and information policy. Contact: Mary Alice Baish (202-662-9200)

The American Library Association (ALA) is a nonprofit educational organization of over 65,000 librarians, library trustees, and other friends of libraries dedicated to improving library services and promoting the public interest in a free and open information society. Contact: Miriam Nisbet (202-628-8410)

The Association of Research Libraries (ARL) is a nonprofit organization of 123 research libraries in North America. ARL's members include university libraries, public libraries, government and national libraries. Its mission is to shape and influence forces affecting the future of research libraries in the process of scholarly communication. ARL programs and services promote equitable access to and effective uses of recorded knowledge in support of teaching, research, scholarship and community service. Contact: Prue Adler (202-296-2296)

The Medical Library Association (MLA) is a nonprofit, educational organization, comprised of health sciences information professionals with more than 4,700 members worldwide. Through its programs and services, MLA provides lifelong educational opportunities, supports a knowledgebase of health information research, and works with a global network of partners to promote the importance of quality information for improved health to the health care community and the public. Contact: Carla Funk (312-419-9094 x.14)

The Special Libraries Association (SLA) is a nonprofit global organization for innovative information professionals and their strategic partners. SLA serves more than 12,000 members in 83 countries in the information profession, including corporate, academic and government information specialists. SLA promotes and strengthens its members through learning, advocacy and networking initiatives. Contact: Doug Newcomb (202-939-3676)

Mr. STEARNS. I thank the gentlelady, thank you. It's my privilege to start with the questions for the first panel.

I would start with just a question for Mr. Lessig and Mr. Valenti and just a yes or no on this.

Professor Lessig——

Mr. VALENTI. Impossible.

Mr. STEARNS. Does the consumer have the right to make a single copy of a DVD and a CD for his own fair use, yes or no?

Mr. LESSIG. Can I say "absolutely yes"?

Mr. STEARNS. All right. And let me just ask Mr. Valenti the same question. Does a consumer, if he purchased a product, have a right to make a single copy of his DVD, CD?

Mr. VALENTI. No, he does not under the law.

Mr. STEARNS. For his use. He cannot, in your opinion, make even one copy for his own fair use, is that your position?

Mr. VALENTI. I have to say that's my opinion, Mr. Chairman. I wish you could give me one sentence after that.

Mr. STEARNS. Go ahead, go ahead. No, certainly, certainly.

Mr. VALENTI. No machine can tell whether you're making just one copy or a thousand copies, that's the reason.

Mr. STEARNS. Okay. But I can go home and make a copy of my CD and give it to my wife and come to Washington and bring the original with me. Why can't I do that with a DVD?

Mr. VALENTI. I can't speak for the music industry. There are people here to do that. It's because if you do that, once you allow one person to break circumvention, you must allow everyone to break circumvention and not everybody is honest like you and Al Swift and me.

Mr. STEARNS. I understand. Mr. Lessig, Mr. Valenti showed you "The Runaway Jury" that they purchased right here in Washington, D.C. It's a copy on a 321. He held it up and as we know in the medical profession "do no harm" is what they talk about. And I'm not sure you would want to rely on the person who bought that "Runaway Jury" not to make another copy. Mr. Valenti and the people who are against this bill say once you put that camel's nose under the tent, 321 cannot stop somebody from making another copy. So what do you say to that argument that the "Runaway Jury" he bought here in Washington, D.C. and it could be as we speak copies being made and sent anywhere and everywhere, not to mention we have global economy and cross border fraud is rampant.

Mr. LESSIG. I would say that that copying for purposes beyond what would be considered fair use is wrong and it should be prosecuted as such. But we should be clear that the tradition that says that the copyright owner gets to control every use of their copyrighted material has never been the tradition in the United States. Under the CD example that you gave, in fact, the Audio Home Recording Act explicitly says that a consumer has a right to make a copy, a home copy of a CD. You haven't around to the question of the DVD, but I can't see why there would be a difference.

Mr. STEARNS. Any difference.

Mr. LESSIG. Except if you believe that they get a perfect right to control every use of creative material. Now that's not our tradition. I know other countries might see it as their tradition. I see that might be one reason why the recording industry, for example, which is owned by primarily foreign countries, doesn't understand our fair use tradition, but in our fair use tradition, the consumer

has a right against the copyright owner's right and it's the job of Congress to balance those.

Mr. STEARNS. Okay, Mr. Valenti, you heard from the Professor and he argued before the Supreme Court. And his case held that I guess you were arguing for a shorter term for copyright and you lost the case, or lost that part. You said there was a silver lining. As I understand you, you said the silver lining was that the Motion Picture Association or Recording Industry cannot deny the right of consumers to make fair use of copy.

Now we have the Supreme Court arguing that case. So I ask you, Mr. Valenti, if the Supreme Court has ruled that the right of the consumer to make a fair use of his own copies is there, why would you deny that right, if the Supreme Court has ruled that?

Mr. VALENTI. I think the Supreme Court said that fair use was alive and well. And I agree with that. Fair use is alive and well under the catalog of the uses which you said in your opening statement, Mr. Chairman.

Mr. STEARNS. But am I interpreting, Professor, the silver lining of the Supreme Court decision was?

Mr. LESSIG. Yes.

Mr. STEARNS. So if that is correct, as a Congressman I would say it appears to me the Supreme Court saying it's okay for me to record a DVD from my own home use. .

Is that wrong?

Mr. VALENTI. I heard Mr. Lessig speak and he did very well. But the only possibility that he lost.

But I'm not aware of the language and I'd have to plead ignorant. I've got lawyers back of me.

Mr. STEARNS. I'll give you a few moments. The former colleague, Mr. Swift, you know here, we have to make decisions here, as you know, but sometimes the decision comes down as Mr. Valenti said on national security here. I mean, you can make it on the technical, you can make it on this and that, but sometimes in the bottom of your heart, you say the United States has one industry in which we have a surplus and it's our intellectual property rights because of the creativity of the Motion Picture Association.

And if we allow and we say we allow somebody to record one, can we trust that we might lose some national security revenue of creating all these jobs of an industry that we are the leader on. We lost the TV debate. We lost the VCR debate. Everybody is moving overseas to manufacture, but we have something here that is very precious. Shouldn't, as a Congressman, we take into the argument that national security is important and to protect the intellectual property rights by maybe making exception here?

Mr. SWIFT. Of course, we should be careful that we do something here that wouldn't hurt the national security. On the other hand, this is not the only way to deal with this problem.

Mr. STEARNS. Yes.

Mr. SWIFT. This is a solution that is designed to take the problem out of the industry's pocket and put it in the pocket of the American consumer. That's not fair.

On the other hand, in the vast majority of the really big pirating, goes on not in this country. It's not American consumers. What can be done. What can Congress help the trade negotiator do? What

can be done to enforce the law better there? What can be done to enforce the law better in this country where we catch people doing this for commercial purposes?

I've been informed, but I haven't checked this out personally, but that our law enforcement agencies simply don't put a very high priority on this kind of crime because they're off doing other kinds of crime.

Well, Congress can help rearrange the priorities. In short, I am not suggesting we do nothing. I'm saying don't do this, okay?

Mr. STEARNS. Do you want to have a reply? I'm all done. My time has expired. Is there anything you'd like to add?

Mr. VALENTI. I'd like to ask Professor Lessig to read that part where it says you can make a full length copy of a motion picture.

Mr. STEARNS. It's not in the ruling, but it's his interpretation.

My time has expired. The ranking member, Ms. Schakowsky.

Ms. SCHAKOWSKY. Thank you, Mr. Chairman. Mr. Valenti, you asked the right question. You said we should in every case when we pass legislation here, the asking is in the public interest or is it not.

But I find it, I find myself hard pressed having listened to Congressman Swift's testimony about his personal experience and perhaps even more generally, Ms. Nisbet's testimony about the impact on libraries, on archiving information, if that's the right word and just the free exchange of information for the general public, how do you justify then using such a broad brush in areas where in my view, what I've heard, clearly is excluding areas which are in the public interest?

Mr. VALENTI. Well, about libraries. I've plundered every library that I've been associated with. And I love them. As a matter of fact, in 1998, the Library Association was one of the people in the room, along with the internet service providers, computer manufacturers, music, business software and movies in which we together came back to the Chairman of both the Judiciary Committee and the House and the Senate with our concept of how this bill ought to be formed.

Ms. SCHAKOWSKY. Excuse me, but Mr. Boucher himself testified that he voted for that legislation, so it is in the subsequent 6 years in the new development of technologies that we're back here now reconsidering.

And you, Mr. Valenti, also did testify against VCR technologies, as I understand it.

Mr. VALENTI. No, I did not.

Ms. SCHAKOWSKY. Well, your industry was not in favor or—

Mr. VALENTI. My industry did not do that. What we were seeking, Madam Congressman, and this is where they don't quote something else that I said. We wanted a copyright royalty fee, not to abolish the VCR. That is an absolute canard. We wanted a copyright royalty fee placed on blank videocassettes much as they do in Europe today, with the proceeds of that small levy going back to copyright holders to compensate them partially for piracy which I predicted would be immense and we do lose today in analog and hard goods piracy, over \$3 billion a year.

We never wanted to admit it. Not on the library side, the libraries today are replete, I think. Ms. Nisbet, I can't speak for you—

Ms. SCHAKOWSKY. I would ask her to respond.

Mr. VALENTI. The libraries have CDs, DVDs, videocassettes where you can walk into a library today and take out a DVD of a movie you want to see at home, watch it several times and bring it back to the library. That's there. You don't need 107 to help the consumers use those DVDs.

Ms. SCHAKOWSKY. And Ms. Nisbet, what would the budgets of libraries be if, in terms of doing the kinds of business that you want to do if you had to buy a new DVD every time or explain to me why this would be so burdensome, is so burdensome for libraries.

Ms. NISBE. Well, of course, it is very complicated. First of all let me make very clear that libraries do, from the get go, pay more money as institutions to enable their patrons to be able to use materials.

Ms. SCHAKOWSKY. Right.

Ms. NISBE. So we're not—we're expending a fee that greatly exceeds what an individual would. What we fear is not being able to use the exceptions that are already in the law in other places of the copyright law that allow us to do certain things such as inter-library loan or special kinds of lending including DVDs, art work, maps, everything you can imagine, because of technological measures that now under 1201(a) we are not allowed to circumvent.

Ms. SCHAKOWSKY. Is there no way, I don't know if it's Mr. Shapiro—is there no way to develop a kind of technology that would somehow allow both for the legal purposes and somehow prevent the mass illegal distribution. Is there such a thing?

Mr. SHAPIRO. Technology can be done, can be created to do almost anything. Indeed, some of the fixes with the broadcast flag, the Audio Home Recording Act and others, a very specific narrow technology under a very specific defined product.

The challenges we're facing with this legislation is it's very broad and includes everything. In essence, there's three laws at issue there. There's the copyright law. There's the DMCA and there's the law of unintended consequences. And we're dealing with tremendous consequences from that including—what's being used by competitors, essentially, to block out other competitors and you gave the example of the garage door openers and the printer cartridges.

But what we think is—like, for example, Congress has not decided that the car should be regulated in terms of its speed. Instead, it's been the conduct itself is what's been regulated. And rather than regulating the technology and when you're not regulatory when health and safety and people's lives are at stake, here you're focusing on something, intellectual property, which has less rights than real property and always has under our Constitution and our set of laws, and you've given it greater rights, if you will, than real property.

Yet, when we're talking about the harm that Mr. Holleyman and Mr. Valenti talk about, loss from alleged piracy, what they do is they count every time there's a recording or copy made as a loss sale and they come up with billions and billions of dollars. And especially with the music industry case, the fact is the studies show that the losses there are not what—people are not going to go out and buy these products if they can't copy them. They're getting a use of them, but it's not a physical copy that's been taken. So yes,

technology is available to do different things, but it has to be extraordinarily narrow and it has to be very careful and the conduct should be the focus, not the technology. Otherwise, Mr. Valenti's—people actually did seek an injunction of the VCR. That is what the Sony Betamax case is about. And a Court did hold and did grant that injunction. And that's when it went up to the Supreme Court, it was to stop the sale of the VCR.

Ms. SCHAKOWSKY. I thank you. My time is expired, but I would like, Mr. Chairman, to enter into the record the statement of the Ranking Democrat, Mr. Dingell.

Mr. STEARNS. By unanimous consent, Mr. Dingell's statement is put in the record.

Mr. Ferguson.

Mr. FERGUSON. Thank you, Mr. Chairman. Thank you for holding this hearing. I have a couple of questions for Mr. Lessig, Professor Lessig.

I'm not a constitutional lawyer. I'm not an intellectual property lawyer. I'm not a lawyer at all, in fact.

Which maybe today puts me at a disadvantage, but gosh, I'm usually pretty glad about that. There are obvious folks in this room who are more experts on this subject and issue than I am, but just help me walk through this a little bit from my own intellectual standpoint.

You believe that someone who buys a DVD in a store should be able to make a copy of that for their own personal use?

Is that correct? That's what you said before?

Mr. LESSIG. That's right.

Mr. FERGUSON. How is this different from say another product? If I go to the store and I buy a bag of apples and I'm on my way home and I drop them or lose them or they break. I can't go back to the store and get another free bag of apples. If I go and buy a car, I don't get a second car for my own use because I might be in Washington and my family might be in New Jersey and since we can't both use it at the same time I get two cars to—for my own personal use. It's not for—it's not to sell to somebody. It's not to rent out to somebody, but I don't get a second car.

And it's maybe because I don't understand the intellectual property laws and all the Supreme Court decisions and what not. But just help me out. How is this different and if, in fact, someone said well, you actually can get a second car if you buy one, if there were no constraints on that dealer making sure that Ellen got only my second car, what if there was no way to know if I could go get a third car and a fourth car? Wouldn't the car folks be out of business pretty fast?

Mr. LESSIG. It is a great question, and I will confess long after I was a lawyer and even after I was a law professor I had exactly the same question when I first started thinking about intellectual property. But the fact is our framers, from the very beginning of our republic, understood there are very different principles that apply to what Jack Valenti, I think, beautifully calls creative property and ordinary property.

And one obvious reason is that if you have an apple and I eat your apple, you cannot eat your apple, too. But if I have a poem

and you consume my poem, I have the same poem. I can enjoy it just as much as you can.

Jefferson saw that. He turned it into poetry. "He who lights his light from mine gets light without darkening me." That is the concept of intellectual property. It is different from ordinary property.

Now, for 200 years, the United States has developed a very nuance, and I think for 186 of those years fundamentally correct, balance in the context of intellectual property that is different from real property. You have a car. You do not have to turn that car over to the public domain after a, quote, limited time, but the copyright clause says after you get a copyright, after a limited time it passes into the public domain and you get no compensation. It is a fundamentally different regime.

What this issue is about is we have a law that has fundamental balances built into it. Copyright law has balances called fair use built into it.

Technologists come along, and they say to the movie industry, "We have technologies to effectively remove those balances so that effectively a consumer does not have the fair use right that the copyright law would have given him." Now, I do not argue that they could not be allowed to deploy their technology, but the contrary to that is that consumers ought to be allowed to deploy a technology to allow them to engage in fair use of copyrighted material just like they are allowed to deploy a technology to remove the effective fair use from copyright material.

Mr. FERGUSON. Is there technology today that would allow someone to make one copy of a DVD and only one?

Mr. LESSIG. Well, I agree that—

Mr. FERGUSON. Does it exist?

Mr. LESSIG. Yes, it does exist.

Mr. FERGUSON. Do we know?

Mr. LESSIG. The technology does not easily map under the complexity of the law, and that, we could go on forever about how disastrously complex fair use law is, and I think that is a very important problem that Congress needs to address.

But given the law and the Supreme Court's statement that it is a First Amendment reason that we have fair use law built into the copyright regime, the only issue I think you have to consider is should the law back up a technology that gives them the power to remove that fair use right, and I do not think there is a constitutional bound—

Mr. FERGUSON. Your poem, if you copyright a poem, I cannot profit from that.

Mr. LESSIG. Absolutely not, and you should not be allowed to profit from it, especially my poetry, but I would be happy if somebody profited.

[Laughter.]

Mr. FERGUSON. But my question is if the technology does not exist, I have not heard anyone say it does. Am I wrong?

Mr. LESSIG. It does not exist.

Mr. VALENTI. It does not exist.

Mr. FERGUSON. How do we keep someone from profiting from someone else's copyrighted intellectual property?

Mr. LESSIG. But can I just suggest I think former Congressman Swift has given us the map about this. The fact that the technology doesn't force people to obey the law does not mean that people, all people, average people, ordinary people will break the law.

What former Congressman Swift shows is, I think, what ordinary consumers do. They obey the law when given an easy way to obey the law. Now, some people do not, and you should be prosecuting people who do not. You should be passing strong laws against people who do not.

But the point is the fair use rights have always given people an opportunity to violate the law. It has always been that right, and the question is whether that right should be removed.

Mr. FERGUSON. Mr. Chairman, my time is up. Mr. Valenti is chomping at the bit to say something.

Mr. VALENTI. I am. I think there is a disreputable plausibility about what Professor Lessig is saying here, and that is he is saying correctly I have no problem with Al Swift making a backup copy because I know exactly what he is going to do with it. It is his personal collection.

But this 107 is so broad it says anyone, anyone can hack. You legalize hacking for everybody. Now, Professor Lessig will probably confirm there is not single machine in the world today that can distinguish between an honest Al Swift and a fellow who is determined to make 1,000 copies.

Therein lies the plausibility that falls apart, which very seldom happens, I imagine with Professor Lessig, but you make this available to everybody, Mr. Congressman. How do you know who is doing it the Al Swift way and how do you know who is doing it the other way?

Mr. STEARNS. The gentleman's time has expired.

The gentlelady from Missouri.

Ms. McCARTHY. Thank you, Mr. Chairman, and thank you, panelists. And I do think, Mr. Valenti, that, indeed, the intent of the legislation is ahead of the ability of technology to carry out what would appear to be a reasonable request.

My overarching concern remains the question of how we lost respect for creative property in this country and in this world. I have two teenage nephews, and we go round and round on this issue. I have tried getting them gift certificates to their favorite record stores for their records and CDs, you know, the Best Buys of the world for their movies, but there seems to me, particularly in the younger generation, a sense that creative works are not owned by another.

And that is a moral issue I think no legislation can necessarily address, but the creative work is owned by the person who created it, sharing it. I was a high school English teacher. I know the importance of being able to share that, you know, in a learning environment.

But if a student sat and borrowed material off of a fellow student's test during a test setting, that would be cheating. That is the creative work of one student taken by and used by another, and that is something we do not uphold or have not upheld. It is a creative issue because whether it is music or literature or art or invention, it is that artist's or creative individual's ownership. So,

Congressman Swift, you are reading a good book and you are going to your lake home for the weekend. What are you going to do, Xerox the book so that you do not have to take the book with you to enjoy and finish at the lake?

But if you can own a lake home, why can't you buy a second copy if you do not want to haul the first?

I mean, last night I had the good fortune of going to Blues Alley and hearing a great jazz group. I liked their work so much I acquired two CDs that night because I wanted to have it here to enjoy and in my district, in my home in Kansas City. Am I a dying breed?

I do not know.

Mr. SWIFT. You ask a very—

Ms. McCARTHY. Economic issues are, indeed, very real. You know, besides the moral issues and the creative issues, it is an economic issue, and all of those have to be addressed. Again, I don't think we ever make a perfect law or rarely in this world. So there are times to readdress it, but I think currently the intent of what you are proposing today is ahead of the technology that could control it and make it a realistic approach.

But I would welcome any response from the panelists briefly.

Mr. SWIFT. Well, the initial question you asked is interesting because my granddaughter, who would not go into a grocery store and steal an apple, had this huge debate with me. My good friend Jack Valenti would have been proud of me in arguing with her that it is inappropriate to just rip things from the Internet without paying for them.

But part of the answer to your question may be what the professors said. What he just said is the first time I have ever understood the specific difference between intellectual property and real property. And I think what the kids are not understanding, those that would not steal real property, but they do not understand the value of something that is so ephemeral, and maybe we need to do a better job of making that distinction for society as a whole and for our young people.

As to whether or not I could afford to buy another CD for the home in the country, I think I probably bought enough CDs in my life.

Mr. LESSIG. Congresswoman, may I respond? I agree—

Ms. McCARTHY. Let me ask the permission of the Chair because we have gone over, but I would love to hear your response, Professor.

May I have an extended—yes, please.

Mr. LESSIG. It is an economic issue, but I think we should understand there are more than one sector of the economy involved here. There is the content industry, which I think is extraordinarily important and vital to especially our balance of trade, but there is also the technology industry which is providing devices that enable people to do all sorts of new things with the technology, not every use of which they have to seek permission first.

The whole issue in this case is whether the content industry has a right to block technologies that do not give them perfect control over their content. So here is a technology, the Xerox machine.

Does the Xerox machine guarantee that nobody can use it to violate copyright law? Absolutely not.

What we do, as former Congressman Swift rightly points out, is we have lots of systems to make sure people do not use the technology in an illegal way, and as libraries demonstrate, they have lots of ways to make sure people do not use the technology in a library in an illegal way.

But the technology itself is not banned, but effectively what is happening here is because there are people who violate the law, we are saying the technology that would enable people to do legal things under the law should be banned. That is the first time in our history we would ever have done that, and I think it would be a mistake.

Mr. STEARNS. I thank the gentlelady.

The rules of the committee are that if you waived your opening statement, you get 3 minutes additional time. So you get 8 minutes. If you showed up after we started our opening statements and what we're hearing from the panel, you would not get that because you did not have an opportunity to waive your opening statement.

But I would urge the members to try and keep it under 5 minutes. I think one of our witnesses, possibly another one, would like to leave a little after 12. So to give the benefit for everybody to get an opportunity to ask everybody a question, I just hope you can keep it within five, but obviously the rule allow you to go to eight if you waive your opening statement.

The gentleman from California.

Mr. VALENTI. Mr. Chairman, may I interrupt?

Mr. STEARNS. Yes.

Mr. VALENTI. I do have to be at City Hall at 12 noon.

Mr. STEARNS. Okay.

Mr. VALENTI. I think you told the staff about this earlier.

Mr. STEARNS. I know. That is why I sort of tried to urge the members here, knowing that you have to leave around 12, that we could—

Mr. VALENTI. Well, I have to unfortunately. The mayor has summoned me there at 12 noon, and I hope I do not have to break some speed limits in order to make it.

Mr. STEARNS. So you would like to excuse yourself?

Mr. VALENTI. May I do that, sir?

Mr. STEARNS. Absolutely, absolutely. We thank you for your attendance, and we will continue on.

Mr. BOUCHER. Mr. Valenti, can I ask you to be 1 second late for that?

Mr. VALENTI. Yes, sir. I never say no to a Congressman, particularly on a sitting committee like this.

Mr. BOUCHER. Jack, you never said no to me when we were just having Christmas dinner and I wasn't a Congressman.

I will be very, very brief on your question. You talked about the Sony Betamax days and how the desire was to have, if you will, a royalty on recordable material. Putting you on the spot here, if we had a new technology with a new disc that could make recordable material—for a moment, let's assume that we're talking music on one type of disk and video on another—and there was a \$1 specific fee that went onto that new recordable media because it was

the only one that you could copy a DVD to and you had to buy that and pay that extra dollar—would that be consistent with what your thinking was then and what your thinking is now, that there has to be some sort of an offset for the loss of revenue by people some of whom are exercising fair use and some of whom are not?

Mr. VALENTI. I'm not going to get into the price structure because it is violating antitrust laws.

Mr. BOUCHER. We know the dollar is arbitrary. So just in general.

Mr. VALENTI. Right now all of our companies are working on trying to work with the best minds in the consumer electronics industry and the information technology industry to find a secure environment. If we had a secure environment, "secure" meaning you could protect that particular movie, I think backup copies of all of that would be certainly in order, if you could find a secure environment.

I am saying that as Jack Valenti. I am not speaking for any of the companies in the contest industry. But right now that secure environment does not exist. The difference between analogue, Mr. Congressman—I do not have to tell you. You are an expert—and digital is the difference between lightning and the lightning bug. It's just a vast chasm there.

And the minute that the Internet came into being, which we think is the greatest distribution system ever struck off by the hand and brain of man, and we want to use it to have thousands of films up there in a secure environment beamed down to every home, to be used when they wanted it, the kind of movie they wanted to see. That is what we are struggling to do.

In the interim though, you have to protect. I think it is in the national interest to protect this extraordinary engine of economic growth that business software and music and movies are for this country, what we do for this country. In this interim, as we begin to move more and more into the digital era, which is digital, mobile, and virtual, that is what the future is all about.

Therefore, you have to make sure that this valuable creative property is protected until the technology that Professor Lessig and I think Al Swift and others are talk about can be put into place. But you cannot walk away and let everybody break these encryption codes and the honest people will do right, but the dishonest people will not do right. And in the digital age, that will be a devastation I don't even want to comprehend.

Mr. BOUCHER. Thank you, Mr. Valenti.

Mr. STEARNS. If you have counsel that you would like to have participate in your substitution, it would be acceptable to have him—

Mr. VALENTI. David Green.

Mr. STEARNS. [continuing] come to the table, and then we still would have the opportunity to have your point of view expressed in all fairness. So I would be very glad to offer that invitation.

Mr. VALENTI. David has the additional asset that he is a lawyer.

Mr. STEARNS. So, David, if you would just give your full name so that we have it.

Mr. David GREEN. Yes. It is David Green. I am Vice President and counsel with the MPAA.

Mr. STEARNS. Okay, fine.

Mr. BOUCHER. Thank you, Mr. Chairman.

Continuing along without a break, Mr. Swift, you know, I listened to what you had to say about your 3,000 records, and I listened actually to Mr. Green on the other side, and I was concerned because I think one of the problems this panel has to deal with is what is fair use, and I realize the library has a unique fair use arrangement historically and in the law, but I'm trying to understand something. When you make copies and give them to your grandchildren or you make less than a full copy, but you cut several songs here and several songs there, do you think that's fair use, or putting it another way, having been someone who paid for several Harvard degrees by hiring lawyers for too many years, isn't each song an individual copyrighted piece? And if you take one song, not an album, but each individual song and you simply create duplicates and send them off to unrelated parties, that is not written within the statute as fair use. You are creating a new copy no different than if I buy one sheet of music and give a copy to everyone in the choir at church.

Mr. SWIFT. What I believe I am doing is creating something new. CDs will typically have a single artist singing a variety of songs. Maybe there is a theme to it. I will create a different theme and from my collection pick a whole variety of records that work out that theme. So that from my standpoint I have created something new.

I have had people who have listened to those and say, "Hey, I like cut four. What is the name of that?" And I will give them the information, and they will go out and buy the CD because they want the whole thing.

So I think it is under fair use, and I certainly think that it is not just a series of individual recordings that I am putting together. It is a whole new program that I am putting together.

Mr. BOUCHER. Well, and I appreciate that.

Mr. STEARNS. The gentleman's time has expired.

Mr. BOUCHER. Mr. Chairman, just one follow-up on my sort of stolen time.

Because I do disagree with that, and we will get back to what really the copyrighted material was because I think that is going to be important in the next round.

But, Mr. Shapiro, the difference between a patent and a copyright, patents having no fair use, if you will, and a copyright, could you just explain to us why you would view that differently?

Mr. SHAPIRO. Absolutely. A patent has a very limited term. It is under 20 years. A copyright by acts of Congress, which Mr. Lessig tried to challenge in the Supreme Court, has gone on virtually forever.

And I will go to my grave regretting the fact that industries did not oppose those extensions of copyright because I would like to respond also to your question or—I am sorry—your colleague's question about the ethics involved in this.

The reason there is changing ethics involving copyright as opposed to perhaps patents is I think there is a sense of unfairness in the American people. They see copyright extending forever. They do not see public domain available stuff.

I think the motion picture industry in a sense has done it right. A DVD can be had for just about the cost of a CD. So when it comes to music they are ready to copy. When it comes to movies, I think there is a moral reason not to. I think that is how people are perceiving it.

Mr. STEARNS. The gentleman's time has expired.

Mr. Davis, you are recognized.

Mr. DAVIS. Thank you, Mr. Chairman.

I would like to start with Professor Lessig. One of the issues here seems to be the extent to which you and your side is willing to acknowledge the magnitude of the potential harm. Would you acknowledge that if the fair use notion that you're advocating were adopted, that there would be instances of substantial harms in terms of extra copying and proliferation of digitized material on the Internet?

Mr. LESSIG. Yes.

Mr. DAVIS. Okay. You have also suggested in instances of wrong like that that prosecution should proceed, but wouldn't you also knowledg, given the magnitude of the damages here that there is a substantial risk that prosecution will be an inadequate remedy in terms of restitution and potentially deterrence?

Mr. LESSIG. I agree it is possible, but if I can follow up on that, there are, as former Congressman Swift suggested, lots of ways to make sure people obey the law. The question here is whether perfect control through technology should be allowed, given the constitutional requirement of fair use.

So I would beg to differ with Congressman Issa. The question before this committee is not what fair use is because that has been decided by the courts and by Congress. Fair use has been decided. The only issue that this statute raises is whether you should have fair use despite the fact somebody has used a technology to take it away.

Mr. DAVIS. But I agree with you the perfect is the enemy of the good almost always. But isn't it fair to say that criminal prosecution—and we are not just talking about possibilities. Let's talk about practicalities—criminal prosecution in plenty of instances may be a terribly inadequate source of restitution, given the potential magnitude of harm here.

Mr. LESSIG. That is right, and so I do not think criminal prosecution is the best alternative. In fact, I would endorse in the context of music exactly what Jack Valenti was talking about in the context of VCRs in 1976, which is finding a way to raise money to compensate artists without destroying the technology.

So in the context of the Internet we could find ways, and there have been bills proposed, that would compensate artists without breaking the Internet so that people can distribute content.

Mr. DAVIS. So if we moved from your bill to a middle ground, you would advocate that we focus on a compensation model as opposed to a prevention model?

Mr. LESSIG. All that I am saying is that there are techniques which could be compensation, or it could be prevention which are alternatives available instead of the criminal prosecution that you were raising.

Mr. DAVIS. Have you seen a model that you would commend to us to consider?

Mr. LESSIG. Congressman, I cannot stop writing books about them. So, yes, I have lots of alternatives and I have written in long length about some of these alternatives. My most recent book, in fact, outlines a way to get from here to a place where we can more effectively—

Mr. DAVIS. Well, is your side of this issue having any conversations with the other side on the plausibility of some compensation model?

Mr. LESSIG. Yes, we are. And, in fact, there have been very important conferences, one recently held at Harvard, about exactly that suggestion of finding a compensation model to deal with this problem rather than criminal prosecution or breaking the technology.

But, again, that's a separate issue, it seems to me, from the very narrow and reasonable position being put by this bill, which is whatever compensation models there are, given fair use is a right under our system. It should still be a right even if technology is trying to take it away.

Mr. DAVIS. So I appreciate your candor, I think, in acknowledging that there are genuine problems associated with restitution in a criminal prosecution.

Now, the same question with respect to a civil matter. Given the potential magnitude of harm, couldn't we encounter plenty of instances in which the civil remedy could easily be inadequate, given the magnitude of the harm, the assets, solvency?

Mr. LESSIG. Absolutely could be.

Mr. DAVIS. So perhaps the even more difficult model here than the compensation model you have described is the prevention model. Because I think neither you nor others—and again, I appreciate your candor—I do not think that you all have tried to say that the technology exists today that would allow for only one copy.

As a matter of fact, I have not heard anybody say that given the wealth of resources and intelligence out there anybody is on the verge of developing that technology.

I would like you to talk about the extent to which you think there is self-interest on the part of the people that oppose this bill to developing a business model that utilizes that technology, and is that part of the problem here? You are afraid that they are not interested in developing that, and then in the absence of some political pressure, the development and deployment of that business model is too far down the road?

Mr. LESSIG. Yes, that is a great question. Let's just be sure we are clear on the baseline though. Before we get to DVDs and we deal with CDs, it is not the argument that there is a fair use right to make a copy of the CD. The Audio Home Recording Act gives an explicit right to a consumer to make a copy of that CD not because of some interpretation of the courts, but because of the law.

So we have already built into the law an explicit permission in the contest of CDs. Now the question is whether the digital changes eliminate the rights.

Now, I do think if you look at the string of litigation that has occurred since the beginning of the Internet, litigation against

what I think of as new business models that have tried to find different ways to produce and distribute content.

There is a significant competitive concern that this committee ought to have about whether people are using these monopoly rights not just to protect creators, but also to create a particular business model. In my testimony, I wrote about the MP3.com case, which I think is the easiest case, but Replay TV litigation, which was essentially trying to stop the equivalent of a VCR in the context of a digital VCR is another example of that. I think 321 is another example of that.

There are many instances where businesses are attempting to start a different way of distributing content. We do not have to talk about Napster. Other businesses that I think all of us would think of as legitimate face the extraordinary burden of the complexity of copyright law, and essentially, as one of my colleagues in California now describes it, there is a nuclear pall that sits on top of Silicon Valley stopping investment in this area because they know investment will be stopped so long as it does not have the approval of a very narrow set of commercial interests.

Mr. DAVIS. I would like to give Mr. Green, on behalf of Mr. Valenti, or anyone else who is an opponent of the bill to comment on the point about the extent to which there is self-interest on the part of the industries you are representing to as expeditiously as possible develop some form of business model that would allow for what I guess we are calling the elusive, only one copy technology.

Mr. David GREEN. Well, absolutely, and that is something we are working toward and Mr. Valenti testified about. I mean, we have a vision that you will be able to download almost any movie ever made and do so digitally, that you could get one copy, that you could watch it once or using technologies, you could make a copy if that is something that you would be agreeable to.

All of these depend on DRM. All of these depend on encryption schemes that enable you to protect these copies, and that is what we are working so hard to allow.

But if this bill becomes law, those DRM schemes, those encryption schemes can be circumvented legally for fair use purposes, removing the incentive to create them.

Mr. DAVIS. I do not think you are asking for absolute control in terms of the technology. You would be satisfied with some form of technology that significantly minimized the risk of extra copies, but it does not have to be technology that guarantees there would not be any extra copies beyond the one fair use copy.

Mr. David GREEN. We recognize that no—

Mr. STEARNS. The gentleman's time has expired.

Mr. DAVIS. Mr. Chairman, could he answer the question?

Mr. STEARNS. Absolutely.

Mr. DAVIS. And Mr. Holleyman is trying to speak.

Mr. David GREEN. We recognize that no system is perfect, and the idea is to try to minimize the amount of piracy that emerges from this, but the model, and we have seen advertisements for not 321, but other ripping software was never buy a DVD again. Rent, rip, and return, and that is, I think, what would happen if this becomes law.

Mr. SHAPIRO. You asked a very specific question, and I think I would like to clarify. There is technology that does exist in many cases which can only allow one copy. The challenge is it does often not allow for the fair use rights to be exercised.

That technology though is enforceable under present law involving patents. Indeed, the letter that Mr. Valenti read from the DVD Copyright Association, their rights are enforceable through patents, and that is not a trade association, I might add, and for Mr. Valenti to say that the consumer electronics industry supports that position is extreme.

I might add the MPA is a member of ours, but I would never represent myself as representing Mr. Valenti.

Mr. STEARNS. And the time of the gentleman has expired.

Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman.

This is a great hearing, and I was meeting with members from the Army War College. So I apologize if I am following up on some line of thought, but this is tough sledding.

I know that 321 Studios is located close to my home town. I am from Collinsville. They are in St. Louis. So I have got folks in the metropolitan area of St. Louis who have been affected because of job loss because of this.

I have had a chance to go to the communication electronics show years ago, and I was amazed at how the performance industry, movies, and music really drive technology change. I guess that is the thing that surprised me the most, understanding it is really consumer driven desire for new gadgets so you can do all of these neat things for entertainment.

So sometimes we are fighting against each other. The communication electronics folks need the entertainment industry and each other because they are helpful in this.

We have worked hard on another subcommittee, that Telecommunications Subcommittee, in addressing indecency and stuff, and my Kids.US bill, we are continuing to have hearings and pushing for implementation on a child safe location for kids to search for information, protecting them from hyperlinks, protecting them from instant messaging and the like. And we are moving positively, I think, as a Nation to have that.

This whole debate also brings up a technology that is being sold currently from ClearPlay, purchasing in some stores for \$79 that would allow editing of smut and violence and nudity in movies. If I bought the movie, then I think the technology would be such that this piece of equipment would edit that out.

For me having a family with small boys, that is a good deal, and I think I would like to have that ability to do that.

My question for the panelists, and why don't we just go down the line with Mr. Lessig, and as sort as possible: should the public have the opportunity if we purchase, you know, an over-the-counter movie; should we have the ability to edit it for the taste of our own family.

Mr. LESSIG. Absolutely, and the point is if the technology locks up that content, then there is no right for technology companies to circumvent that for this legitimate use, then you your ability to

edit the movie to exclude scenes that you don't want in that movie will be restricted.

Mr. SHIMKUS. Everyone is going to get a chance, but would this legislation proposed help us in order to do that?

Mr. LESSIG. Absolutely. This legislation would guarantee that companies that develop technology, that allow you, for example, to exclude smut from a movie would be able to sell that technology to a consumer so that a consumer in his or her own home could run the movie and exclude that type of content.

Mr. SHIMKUS. Thank you.

Mr. SHAPIRO. Of course you should be allowed to have that technology, and the copyright on this would say you should not. It is just like a fork. A fork could be used to eat food, but a fork could be used to kill people. It is the conduct that matters.

You should not make forks illegal because they could be used to kill people, and that is what is going on here. Technology is being made to be illegal because it might be able to do something which could potentially be illegal, and that is what we have to stop.

The technology is not bad, but the use of it could be. In this case, obviously the use of it should not be, but the copyright monopoly is so strong at this point by acts of Congress that, indeed, even if the technology is legal, it could be argued that what happens there could be held to be illegal.

Mr. SHIMKUS. Mr. Green.

Mr. David GREEN. This bill has nothing to do with the example that you are talking about. The example that you are talking about is a way of fast forwarding not breaking the encryption.

Mr. SHIMKUS. So let me ask you a question then. Is it the Motion Picture Association's opinion that if I were to, as an individual consumer, alter a movie so that my children would not be exposed to things I feel that would be harmful, would that be breaking the copyright law?

Mr. David GREEN. There is an issue under the copyright law of making derivative works. That said, our companies—and this is something the MPAA cannot do—our companies are talking to those companies, and there is every effort to make family friendly versions available, and we are moving toward that.

Mr. SHIMKUS. But making family friendly versions available is different than the individual consumer being able to do that themselves; is that correct?

Mr. David GREEN. And there is certainly nothing wrong with an individual consumer fast forwarding through any portion that they do not want to see to the extent that there are—

Mr. SHIMKUS. But you would have to see it before you could fast forward it, which may give some adults some reason to accept that proposal, but.

Mr. David GREEN. To the extent companies are offering software, I know our companies are talking to them. It is on an individual matter, and it is not something the motion industry can talk about as a collective for antitrust reasons.

Mr. SHIMKUS. Mr. Holleyman.

Mr. HOLLEYMAN. Mr. Shimkus, this is not an issue that the business software industry has been involved in. I would like, however, to make one point that came up in several other questions, which

you know, this bill really creates an exception that swallows the rule.

And there have been a lot of discussions today about ability to make a back-up copy, and what we are saying is that this goes far beyond that, and the software industry is deploying very simple activation tools because of the DMCA that can be deployed in under 30 seconds by the Internet or in a couple of minutes by a telephone call—

Mr. SHIMKUS. Okay. I hear you. Let me go to Mr. Swift, please.

Mr. SWIFT. Yes.

Mr. SHIMKUS. Thank you.

[Laughter.]

Mr. SHIMKUS. And of course, from the American Library Association.

Ms. NISBET. Thank you, Mr. Shimkus.

We would just say whether you are talking about the kind of technology that you are talking about or technology that is aimed toward helping libraries and educational institutions to do what they need to do in terms of dealing with digital products, we believe that H.R. 107 would certainly help that effort, and we would support it.

Mr. SHIMKUS. Great. Thank you, Mr. Chairman.

Mr. STEARNS. I thank my colleague.

I think what we are going to do is let Mr. Gonzalez go, and then we will go vote, and we will take a recess until 1:15. We have five votes on the floor. That is 25 minutes-plus. It will give us a chance to have lunch, and then we will come back.

And, Mr. Gonzalez, what I would like to do is suggest that you have your entire 8 minutes, but if you took five, we could do it now, but if you did the full 8 minutes we would not make our vote. So I am asking you would you like to have your 5 minutes now?

Mr. GONZALEZ. I hear you clearly.

Mr. STEARNS. Or would you like to come back?

Mr. GONZALEZ. Actually just let me get this out of the way.

Mr. STEARNS. Okay. You are recognized.

Mr. GONZALEZ. It will take just a couple of minutes.

Mr. STEARNS. You are recognized.

Mr. GONZALEZ. Thank you very much.

I guess in trying to interpret Mr. Valenti's testimony and getting right down to it and not making it real complicated, it seems to me he is talking about a secure environment, which you are never going to have because it goes way beyond the abilities of technology. You are talking about human nature.

When we can legislate and take care of avarice and greed and everything else, then we will be fine. But it is not going to happen. So in the meantime, let's go ahead and try to regulate and govern human behavior that is practical in nature, and then we will be effective.

The troublesome part of the testimony from the content community is simply where we are today and where we are going to be tomorrow. In the statement by Mr. Valenti, it says that in the recent symposium on DMCA, Professor Samuelson of U.C.-Berkeley posed the question whether it was possible to develop technologies that would allow circumvention for fair uses without opening up

the Pandora's box so that allowing these technologies means that you are essentially repealing the anti-circumvention laws.

Mr. Valenti in answering the Chairman's question says presently you cannot make a copy of the DVD. You just would not be able. There is no fair use right now. There is just no fair use under the present scheme in the interpretation of this statute, and that is why we have H.R. 107.

Prospectively you go and you make reference to this professor, and he says it may not even be possible. So what are we looking to in the future? What is a good regulatory scheme that protects all of the interests and goes back to the overriding issues that it has taken this country 100, 150 years in developing, as the professor has already pointed out? There has to be that balance.

The last thing that came out of Pandora's box, if you remember the tale and the fable, was hope. The position you all are taking seems to tell me that is hopeless, that we are never going to arrive at that state of technology and human behavior.

So why don't we do something that is practical, enforceable, and tries to protect the rights of obviously the copyright holder, but also still acknowledges something that is so fundamental to the way that we conduct our society and that is fair use?

Doesn't it make more sense for us to go over to wherever the vendor was where you purchased that video, the parted video, and prosecute?

I mean we have a tool, don't we? And it is available. So why aren't we doing that?

Mr. David GREEN. Absolutely, and that is one of the things we are doing. But we do have a system that is not perfect, the DVD. The DVD is encrypted. It is made to be read by players that understand that encryption that Mr. Shapiro's folks sell.

Can that encryption be broken? Yes, there are ways to break that encryption.

Does the average person break that encryption to make multiple copies of the movie or to go to the library, borrow a DVD and keep it? No, because there are encryption systems and because companies that make systems, like 321, that are designed to break that encryption and come up with a copy are held to violate the DMCA.

The system is working. The DVDs are—

Mr. GONZALEZ. The system is working because there is no fair use. I mean, if that is what you mean by the system is working, then we have got problems.

Mr. LESSIG. Can I follow up on that?

One reason why people break the encryption on DVDs is the play it on a computer system like the Gnu Linux operating system, for which there are no licensed players. So there is somebody who buys a CD or DVD and wants to play it on their computer but cannot, and that is one reason they circumvent.

But I want to make a point related to your comment about Professor Samuelson. Pam and I both wrote, joint authored an op.ed. in the Washington Post the very day that the DMCA was passed where we said there was exactly this problem that Congressman Boucher and Doolittle have identified; that it reaches beyond what copyright law precisely reaches beyond and does not protect fair use.

But when she was saying that there is no way to build a technology that would perfectly mirror fair use, it wasn't so much a comment about technology's potential. It was a comment about the complexity of analyzing fair use.

Fair use is a doctrine that is designed for humans to interpret against the background of understanding of context and what people's motives are, and to build a technology to do that is extremely hard. But the hope that ends the pulling out of a Pandora's box is that we can begin to talk about other ways to protect legitimate freedoms that consumers ought to have that might not be the mess that fair use is.

So these are other ways to protect freedom that would be beyond fair use.

Now, I think Pam would certainly agree that there are the possibilities of building technology to do that.

Mr. STEARNS. We certainly can continue this discussion when we come back.

Mr. GONZALEZ. That is all. Thank you very much, Mr. Chairman.

Mr. HOLLEYMAN. Can I make a quick comment?

Whenever I deal with the U.S. Attorney General or Chief Justice officials in other countries, the first question that I talk about is enforcement of the piracy problem for software.

The first question I am asked is: what is your industry doing to try to help yourself? And the type of simple activation tools that we have now been able to deploy because of this DMCA is the first clear sign that there are things apart from litigation and Federal enforcement that will help reduce the \$13 billion piracy problem.

We want to retain that right.

Mr. STEARNS. On that we will tell all of the members to come back. We have the recording industry on the second panel, and 321, the corporation.

So with that, the committee will reconvene at 1:15.

[Whereupon, at 12:16 p.m., the committee was recessed for lunch, to reconvene at 1:15 p.m., the same day.]

Mr. STEARNS. The committee will come to order. I think we have everybody in place and we have a member, Mr. Otter, here.

Mr. OTTER. Thank you, Mr. Chairman. I thank the panel for their rather robust discussion of the subject which we are working on today. Professor Lessig, you are the author of several books relative to the public right to copyrighted material?

Mr. LESSIG. That is right.

Mr. OTTER. Did you copyright those books when you wrote them?

Mr. LESSIG. I did.

Mr. OTTER. Why did you copyright them?

Mr. LESSIG. Because I believe a copyright owner and author should have the right to earn back—

Mr. OTTER. So if somebody duplicated your book without you getting a royalty from it, that would be theft?

Mr. LESSIG. Actually it wouldn't be theft.

Mr. OTTER. It would be?

Mr. LESSIG. No, it would not be theft.

Mr. OTTER. Oh, it would not be.

Mr. LESSIG. As the Supreme Court articulated in the Sony case, it is not technical theft. My third book is offered free online under

creative commons license. It allows people to, in fact, copy it so long as they don't engage in commercial use. I think the underlying drive of your question I just want to be very clear about. I fundamentally believe in copyright. I think it ought to be a right for people to control the distribution of work within the bounds of the law and our tradition has struck a very good balance, I think.

Mr. OTTER. Well, we discussed that earlier. I think you have answered my question. You are still a professor at Stanford Law School?

Mr. LESSIG. Yes.

Mr. OTTER. Do you charge just one of the students in the front row or are all the students in your classroom charged the same amount of money for having participated in the exercise of being instructed on the law by yourself? Is everyone of those students charged or just one?

Mr. LESSIG. Everyone is charged.

Mr. OTTER. Well, see, the reason I bring that up is because I am interested in your use and I think misuse of Jefferson's statement relative to the candle because if you spoke to just one student in the classroom, they would all benefit from it without diminishing from the illumination on law of that one student. Isn't that right?

Mr. LESSIG. It is right.

Mr. OTTER. Mr. Shapiro, 1,700 organizations belong to your organization?

Mr. SHAPIRO. Approximately. More like 1,500.

Mr. OTTER. And you are here representing them?

Mr. SHAPIRO. Yes, I am.

Mr. OTTER. Did everyone of them pay into your organization?

Mr. SHAPIRO. In one form or another, yes.

Mr. OTTER. If you were only representing one, why wouldn't they all have benefited from that same—why do you collect from everyone of them that you represent instead of just the one?

Mr. SHAPIRO. The fact is there is 2,500 exhibitors in our show, consumer electronics exhibitors. We represent 1,500 but those other thousand are benefiting from my testimony today, I hope.

Mr. OTTER. Um-hum. Are you going to charge, though?

Mr. SHAPIRO. No, I am not.

Mr. OTTER. Would you charge them if you could?

Mr. SHAPIRO. I highly doubt it.

Mr. OTTER. Then why charge all but one? Why not charge one person?

Mr. SHAPIRO. I think I know where you are going and the reality is this is a bigger question and the question really is is copyright intellectual property law going to be something where there is two purposes. One is to reward the authors and the other is to allow the public good. Or is it going, and this is the vision that the copyright owners have, to a pay for every play society where every use is compensated. I don't think that is what our founders envisioned. We have taken step by step by step to get that pay for every use.

Mr. OTTER. That is a pretty good stretch to suggest that even Jefferson, as brilliant as I believe he was, that he suspected that there would be some day a computer and a CD and all that. Anyway, I think you have answered my question. My point in bringing this up is theft is theft and property is property and I don't care

whether you are talking about dirt in Idaho or if you are talking about somebody's creative genius that they have sold into the market place.

If somebody is stealing it, it is still theft and I see no difference. I haven't gotten the convenience of a learned law degree as you do, Professor, but I now probably understand why more and more lawyers have a problem understanding the Fifth Amendment.

I do know that, let me say for instance, when we were debating rather heavily Medicare bill and it was suggested that what we ought to be doing is perhaps letting the Government under the Fifth Amendment buy out some of the patent rights and copy rights on medicines. Rather than going the full 17 years or 16 years, why don't we buy up some of those? Because we recognize in Government there is no difference between the creative genius in the entertainment field, in the films, in music or anything else than there is in dirt.

If we can have a restrictive covenant on any property that I would buy, there is a restrictive covenant put there either by the Government or the former owner. I don't see any reason why anybody participating in this business couldn't have a restrictive covenant on that as well which means you are limited to one.

I would finalize only by saying I suspect our librarian also makes sure everybody has got a library card and not just one person who may use that book the first time. There is a reason for that, because you are providing a service and you should be paid for it. I agree with that. The problem of it is I can't differentiate between property rights simply because it is the result of one's creative genius or because it is dirt.

Thank you, Mr. Chairman. I yield back.

Mr. STEARNS. Thank you gentlemen. The gentleman from Arizona.

Mr. SHADEGG. Thank you, Mr. Chairman.

Professor Lessig, I am confused. I think the word fair use is being horrendously misused in this hearing. Mr. Gonzalez in his questioning seemed to imply that it is, of course, a fair use for an individual to make a copy of a DVD for himself or herself. You seem to be embracing that definition of fair use. Yet, it seems to me that your written testimony specifically says fair use doesn't cover this. Do you contend that it is a fair use for me as a purchaser of a DVD to make myself one copy?

Mr. LESSIG. I do.

Mr. SHADEGG. Do you contend that it is a fair use for me to make a duplicate copy in case I destroy the first one? It is fair use to make a copy for my wife?

Mr. LESSIG. I am not—

Mr. SHADEGG. Is it fair use for me to make a copy for my two kids?

Mr. LESSIG. Within the same household for noncommercial purposes I believe it would be.

Mr. SHADEGG. Okay. So I can make a copy for my wife, copies for my two kids, a copy to backup. Can I make a copy for my boat?

Mr. LESSIG. No, your boat doesn't get one, no.

Mr. SHADEGG. Oh, my boat doesn't get one. How about my cabin?

Mr. LESSIG. This is the problem with fair use, Congressman. It is the problem of drawing the line of fair use that the courts have historically had to struggle with. But that is not the question before this committee.

Mr. SHADEGG. That is very much the question before this committee because you are using in this hearing the term fair use to say it is absolutely okay for someone to make one copy and now you are saying a copy for their wife and their kids. Yet, I can find no way to fit that concept within the definition of fair use that we are given.

The definition of fair use says you can make a copy for criticism, comment, news, reporting, teaching, scholarship, or research. Well, my wife's use of a DVD just to view it and enjoy it, or my kids' use of a DVD for any of those purposes, they are not using it for criticism or comment or news or reporting or teaching or scholarship or research. They are using it for fun.

There is a four-factor test which says you look at these four factors. One of the factors says if you copy the whole work, that may not be permissible, but the one that you might fit this into says nonprofit educational purposes. It doesn't say all nonprofit purposes. It says all nonprofit educational purposes. How do you apply that to my wife's second copy or my kids' copy? I make a copy of a DVD for my daughter to take to college with her so she can watch the movie over there, how is that a nonprofit educational purpose if it is just entertainment?

Mr. LESSIG. My point is whatever fair use is, and we could and would have a long argument about that, and courts do. Whatever fair use is, this bill is not attempting to modify that.

Mr. SHADEGG. This bill is going at the technology and what this bill says is you want to repeal the technology currently in place that the MPAA and the producers can have where they can encrypt their product to stop people from pirating it. You now want the Congress to step in and say even though they have the ability to encrypt that, you want Congress to legalize equipment that circumvents their encryption.

Mr. LESSIG. For the purpose of fair use so that you have—

Mr. SHADEGG. It is for the purpose of fair use, but you have just acknowledged that the use you want to defend here, which is use by someone you can't define, it is fair use to make a copy for my wife or my kids but not okay for my boat or my cabin.

Mr. LESSIG. What I am saying is whatever the definition of fair use you want to adopt. Maybe you want to adopt one that says you can't make a copy for yourself or your kid. Whatever that definition is, this is not changing that definition. This is saying whatever that definition is technology can't take it away.

Mr. SHADEGG. Then I have a serious problem with your testimony because your written testimony before this committee says that, in fact, fair use is not adequate right now and you say Congress should consider a range of measures—I am reading from page 13 of your testimony—to update fair use in the digital age.

You say H.R. 107 is the way to do that. What you are really saying is we need to pass a law to change, I guess, two things, quite frankly, to take away the right of MPAA to successfully encrypt its

material so that somebody can make a fair use copy, but you also want to update in your words the "doctrine of fair use."

Mr. LESSIG. Right. I think Congress should consider fair use. That is not what 107 is about. I think the law—

Mr. SHADEGG. That is not what your testimony says. I apologize. I have very little time.

I would like to ask all of the panelists if, in fact—first of all, I don't understand why if the MPAA can create technology that makes it impossible for someone to steal their product, why it is a matter of fair use to allow, that is, to authorize technology that eviscerates the purpose of that.

Mr. LESSIG. Congressman, may I respond to that?

Mr. SHADEGG. What I would like you to comment on, and I have only a few seconds left, is why isn't this problem easily solved by the market place by the producers of a DVD simply saying, "Look, we produced a DVD. We will sell it to you. If you want to take it with a restriction so you can't copy it, it is X dollars. If you want to be able to make multiple copies of it, it is three times that."

I guess the second question I have is if the fair use doctrine so clearly allows you to make one copy for your own use, why did we pass the Audio Recording Act specifically saying that you could make a copy of that? It seems to me the fair use doctrine doesn't embrace what you say it embraces because we had to write a law for audio recordings to allow people to do that. I guess I would like each of the witnesses to comment on those if the Chairman will allow.

Mr. STEARNS. Absolutely. Go ahead.

Mr. LESSIG. So if you have a fair use right to do something with someone's content—

Mr. SHADEGG. Well—

Mr. LESSIG. Can I just please answer the question? If you have a fair use right to do something with someone's content, it is not stealing to do that with—

Mr. SHADEGG. Absolutely. So you—

Mr. LESSIG. I am sorry. I am still not finished.

Mr. SHADEGG. Well, let me just make a point. If it is for educational purposes or research purposes, you can contact the MPAA and say, "I want to have a fair use use of this document. I want to use it for the definition of for criticism or comment or news or reporting or teaching or scholarship or research."

But what you want to do is to allow technology that says they can't encrypt it forcing you to ask permission, forcing someone who wants to use it for fair use to even ask permission.

Mr. LESSIG. If you have a fair use right, why should you be forced to ask permission to exercise that right? The point I want to just make clear—

Mr. SHADEGG. Yes, because you are in this room saying the fair use right is anything you want to do.

Mr. LESSIG. No, I didn't say that.

Mr. STEARNS. The gentleman's time has expired. I think what we can do is just let him finish up and let the people answer the question you asked.

Mr. LESSIG. So it is extremely important. I misspoke to Congressman Otter if he understood me to say that one has the right to

steal. All that I am saying is you don't have the right to infringe a copyright. The Supreme Court has said that is not called theft. It is a stupid law professor's distinction. I apologize for embarrassing the committee with such a distinction. I don't mean to say you have a right to engage in copyright infringement.

It is immoral to do that and I think it is wrong and should be prosecuted. All that I am saying, though, is if you are engaging in a fair use right, a right that the law protects as fair use, and we are going to have an argument about what that is, but if that is what you are doing, then it is not theft for you to do it.

The only thing at issue in this bill is should technology steal that fair use right from the consumer. I think it is wrong that technology steals that right from the consumer and people ought to have the right to exercise the fair use right despite the technology.

Mr. STEARNS. The gentleman's time has expired. The full Chairman is going to take the next series of questions and with his time you certainly might want to amplify.

Chairman BARTON. Thank you, Chairman Stearns. I want to start out by making a statement that what we apparently have because of the technological revolution in trying to protect the copyright holders, we have a situation where in trying to do that not only do we not have fair use, we have no use. You can't make a copy today. You can be hauled into court.

The manufacturer of the copying machine can be hauled into court. The person who made the copy, even one copy, technically could be hauled into court for violating one law or various other laws. All we are trying to do today in this hearing is get on the record if there is a way we can balance technology and copyright and fair use. That is all. We are not trying to allow commercial powers here or anything like that.

My question to the professor down at the end of the table to my far left, is this really a debate about the number of copies or the intended use of even one copy? If I make a copy for resale, that is illegal.

Mr. LESSIG. Absolutely.

Chairman BARTON. If I make a small number, and we can disagree on what small number is, but if I make two or three copies for personal use, that should fall under the doctrine of fair use. Isn't that correct?

Mr. LESSIG. I would argue it would but the reality is, and this is what the first part of my testimony tried to address, the cost of adjudicating that are extremely high. Jack Valenti was absolutely right, we have no case saying you can copy a DVD, but that is because the cost of bringing and litigating that issue all the way to a judgment is extremely high. That is a problem with the fair use system as we have it right now. That, I think, is independent from this bill. Your bill is saying whatever fair use is, that right should not be taken from the consumer through technology.

Chairman BARTON. Now, I want to ask Mr. Shapiro, you are here, for lack of a better term, representing the electronics industry and some of your associations make equipment or devices that can make copies. Is that correct?

Mr. SHAPIRO. Absolutely.

Chairman BARTON. Is it your opinion that it is technologically possible to make a device that would allow some small number of copies to be made without making it possible for that same equipment to replicate a large number of so-called perfect copies that could be used for resale for commercial purposes. In other words, can the doctrine of fair use be made technologically compatible so that in the digital age we do protect the commercial rights of the copyright holder? Is it technologically possible to do that?

Mr. SHAPIRO. The Audio Home Recording Act is a good example of where we address the very narrow area of digital audio recording. We agreed and the Congress agreed that it would make sense to allow an unlimited number of original copies but no copies of the copies. In other words, the chain was broken and that was agreed in addition to royalties being paid.

Now, you could argue whether that was a good law or bad law, but technologically it has worked. I haven't heard any allegations that it is broken. Similarly, with the DVD, for example, you have a system in place which works fairly well. The motion picture and the consumer electronics industry got together and agreed on the standard. There is some disagreement now whether this legislation is necessary.

Indeed, Mr. Valenti referred to a letter from the DVD Copy Control Association. I have been asked by the counsel for that association to clarify they are not opposing this legislation. Indeed, they just have some specific comments on it. Indeed, a lot of their efforts are supported by patent enforcement. Many of these things can be done by patent enforcement.

This new DMC, Digital Media Copyright Act, is something which would be very, very positive in the sense that you can come up with specific technical fixes but as Professor Lessig has said, it is not that you are changing copyright law. It is that you are allowing consumers to exercise their fair use rights and that is all we are trying to do here today.

Chairman BARTON. I understand Mr. Valenti has to leave. I know your face but I don't know your name.

Mr. DAVID GREEN. David Green. I apologize Mr. Valenti had to leave but I am going to try to fill his large shoes.

Chairman BARTON. If you want to answer that question but I have another question specifically for you.

Mr. DAVID GREEN. Just a couple of very quick points. One, fair use is alive and well. There is absolutely a right. For example, if Professor Lessig wants to show a couple minute clip to his class, he can take a DVD and he can show it to his class.

Fair use does not mean that he gets to necessarily make a copy of that and there is no right, not only in our opinion but in the opinion of the courts and the copyright act to make a full-fledged copy of DVD for backup purposes or to give to your kids, use as Christmas gifts, or whatever. Even though you are not selling it, establishing such a right could be devastating for the—

Chairman BARTON. So your association doesn't even accept that you could make one copy for personal use?

Mr. DAVID GREEN. It is not only our association but I think that is what the law is.

Chairman BARTON. So you disagree with what the Professor said in his testimony, and I quote from page 8, "The late Professor Lyman Ray Patterson made clear copyright has never accorded the copyright owner complete control over all possible uses of his work." You disagree with that?

Mr. DAVID GREEN. There is no right to make a full backup copy. That is what the Copyright office has said. That is what the courts have said and there is no right to make a backup or personal use copy of a DVD.

Chairman BARTON. Well, I disagree with that. That is my opinion. Is it MPAA's official position that you will accept no—there is no way to find a compromise on this issue? You all are going to hop in the Alamo and hope somebody arrives but if you are going to go down fighting, you are going to die for MPAA and the Alamo no matter how many troops are marshalled against you and how many arguments?

Mr. DAVID GREEN. I am not sure we necessarily—

Chairman BARTON. I don't mean literally die.

Mr. DAVID GREEN. We see ourselves on the side of right on this. We are, of course, looking for ways of making things clear but we do think there is a reasonable compromise, that the DMCA establish that compromise, and that it does allow for the full flowering of fair use in universities and everything and not to allow this whole system to come to a crash to allow people to de-encrypt at will the encryption systems. I think that will end up with less consumer choice, not more consumer choice.

Chairman BARTON. Well, my time has expired. I want to ask one question of Mr. Swift as a former member of this committee, former subcommittee Chairman of this committee, do you agree with Mr. Green that you have no rights to make any copy of anything at any time?

Mr. SWIFT. No. I believe what has happened is that when the digital age came we all panicked and we rushed in and provided draconian protections unlike virtually any other protections we provide anybody else for anything. We normally punish behavior. What we have done here is to provide a mechanism by which you just say having the mechanism is what we do and you cannot play around with the mechanism. I think that is wholly inappropriate. There are other ills in our society.

For example, let us just take a kind of exaggerated example. Shoplifting is a very expensive drain on our economy. Retailers suffer enormously from shoplifting. We could probably eliminate shoplifting if we simply allowed every retailer to put handcuffs on every customer that came to the door. They could nod at what they wanted, they would pay for it, take the handcuffs off, and they could go home.

That is an exaggerated analogy but I think it is really analogous to the way in which we have sought to provide protections for the recording industries. Clearly they need the protection. I don't think there is anybody here arguing that they shouldn't have protections. It is the way in which we have sought to do it.

One of the things I have noticed here today is we are all focused as though this is the only way to provide protections. Earlier we talked about some other things. Trade negotiations. We talked

about trying to change and increase the enforcement for the laws that already exist for misuse and abuse of copyrights. So this is not a this way or no way kind of way of dealing with their legitimate concerns about piracy. You have got to get off that and start looking for ways that give them the protection they need that doesn't intrude so massively on the American consumer. That is all I am saying.

Chairman BARTON. My time has expired.

Mr. STEARNS. Mr. Stupak.

Mr. STUPAK. Well, thank you. It has been an interesting discussion to say the least this morning. If we legalize this legislation, circumvention for noninfringing uses of copyrighted work, it is my understanding there is no technology out there that could prevent like you make your one personal copy you want to make and that is it, right? I mean, you can just keep making those copies, DVDs, CD, or whatever it is, right?

Mr. DAVID GREEN. Let me just clarify. There are encryption schemes that would allow you to make one copy. If you allow hacking, if you allow circumvention, you have striped the encryption scheme.

Mr. STUPAK. So you would be in favor of encryption with one copy?

Mr. DAVID GREEN. There are all sorts of options that we are working on that would allow one copy legally with the permission of the copyright owner.

Mr. STUPAK. Okay. Encryption is what, just DVD, right?

Mr. DAVID GREEN. Well, no. Encryption would also be on digital distribution where if you decide, "I want to download a movie. I want to watch it once," we could build into this and this is what the music industry has done and what we are certainly looking to do. If you want to make a copy—

Mr. STEARNS. Mr. Green, I just need you to pull your microphone up a little closer so we can hear you better.

Mr. STUPAK. So technology does exist then that you can do one copy?

Mr. DAVID GREEN. We are developing encryption technology.

Mr. STUPAK. But it is not there yet?

Mr. DAVID GREEN. We are not there yet.

Mr. STUPAK. When will it occur?

Mr. DAVID GREEN. The incentive to do it is as long as we can protect that encryption technology from de-encryption from circumvention. There is a huge economic incentive. We are doing it as fast as we possibly can. We are working with our friends in the CE and the IT community to make this happen and this stands as a dagger at that effort.

Mr. STUPAK. I don't agree with the sense of the dagger. I don't want to get into the dagger. What I want to get into is is the technology there where we can do one copy and then let it go at that? That is what I am hearing from everybody.

Mr. DAVID GREEN. No system is perfect. It keeps honest people honest and that is the goal here. Keep in mind if they do allow one copy, they usually want to be paid for that additional copy.

Mr. STUPAK. Well, yeah. Okay. There is some value in that work. Whether it is one copy you get it at half price or whatever.

Professor, you want to jump in there?

Mr. LESSIG. I agree that there is technology that can enable one copy. What I don't think that does is guarantee fair use because, for example, fair use might include if you are reading my book and you want to take a chapter out of my book and include it in a criticism on my book, that is fair use.

Mr. STUPAK. Sure it is.

Mr. LESSIG. If I am watching a movie and doing another demonstration and take a section out of it, I can't necessarily do that. Or as CleanFlicks, for example, does, if I want to enable people to skip the parts of the movie that I don't want my children to watch and they build the technology to stop me from doing that, I have no right to circumvent that under the DMCA as it is now.

Mr. STUPAK. You are basically saying technology has to be able to address all the fair use needs of everyone who wants to use it?

Mr. LESSIG. Right. And that is why Pam Samuelson and Ed Felton agreed that there is no simple technology that can do that but that is because of the complexity of fair use.

Mr. STUPAK. I guess the point I am trying to get with, I believe these things have to be protected. We have sat through many hearings about piracy, China in particular where they are using about \$18 billion a year on intellectual property rights. They have factories there that reproduce these things and there is no seeming negotiation or enforcement, whatever you want to say, other than administration saying they will get to it.

Mr. Swift, when you said you went to do your CD and you tried to make a quick copy to get it produced and it wouldn't do it, you called and said, "Hey, what am I doing wrong?" They said, "No, you can't make a copy of it." Shouldn't the store who sold you that CD burner tell you you can't do it? I think they sort of robbed you of your money.

Mr. SWIFT. I think that they probably were assuming that I was more well informed than I am in the details of this Draconian law. What I don't think they are responsible for is setting up the rule in the first place which I disagree with.

Mr. STUPAK. Right, I agree. They are selling you technology now to make copies, if you will, and knowing darn well that, in your case a CD, that you can't make a copy of it. I am always hearing we should have enforcement and education and we wouldn't have to worry about this piracy and it would go away.

Mr. SWIFT. It is true that if—

Mr. STUPAK. Even when you buy a product it educates you.

Mr. SWIFT. It is true that if they had made that clear I wouldn't have bought it because I can already make copies in real time. What I have is another machine that will make copies in real time and they are switched from digital to analog which is fine with me because I don't intend to make a thousand copies of these things. It is not that it changes it from digital to analog and you can't make copies of the copy.

I could care less about that. It is the fact that I can't make a high-speed copy of my original one. All it does is it doesn't give an ounce of protection to the industry. It just takes me four times as long to make the copy. Why should they inconvenience me in that way if, in fact, they get no benefit from it?

Mr. STUPAK. But don't you think that everyone they sell they do get benefit from? Every CD, right?

Mr. SWIFT. No.

Mr. STUPAK. If I am an artist, every CD that I sell I get a benefit from it, right?

Mr. SWIFT. Of course, but the kind of thing I am doing is not making copies of their album. I am doing something entirely differently.

Mr. STUPAK. Back to the question that the Professor said everybody wants their own exception to the exception.

Mr. SWIFT. My fundamental point is that if I can do what I want to do in real time, why advantage is the industry getting from—

Mr. STUPAK. But if you open it up, the person sitting next to you might say, "I want to do something different than Mr. Swift on my own terms and my own conditions." How do you protect the product then? Everybody wants their own exception.

Mr. SWIFT. But my concern is with the consumer and I ask again, what advantage is the industry getting by making me simply have to handle equipment more inconveniently? I end up with exactly the same product, a copy of my copy.

Mr. STEARNS. The gentleman's time has expired. The gentlelady from California.

Ms. BONO. Mr. Swift, I didn't serve with you but, first of all, you are violating multiple copyrights when you do that. In this day and age I don't know what equipment you have but it takes me probably 4 seconds to download a 6-minute song, 4 seconds to download that onto my computer.

To the question of do we have the technology? The answer is yes. That is why we are here. This bill, which I oppose completely, throws away the technology and makes it completely useless. We have DRM. We have come a long way. Years ago, I believe, the recording industry and the motion picture association were well behind where they should have been.

Yes, they tried to stem the tide of technology, but I believe they have been working very, very hard at catching up and those people in this industry know that the greatest tool you all have is the enter key for the first time. We are there. We have DRM. We have things like MagicGate. Now we are saying how about iTunes which on their website, currently just expanded, you can download to multiple iPods.

iPods is a new term. We are not talking about LPs and vinyl 78s and 45s. We are talking about iPods. It is a new world. You can download to multiple iPods, to unlimited iPods, but you can only copy to five different PCs or Macs. And those PCs and Macs can share the information over a LAN. We have come a long way. In my view this bill, with its good intentions and all of my respect to its authors, is not a good bill. It is going to entirely undo where we have come so far to this point. That is not a question, is it? It is a statement.

Mr. SWIFT. I have done that.

Ms. BONO. Mr. Green, just a yes or no if you could. I understand that the Walt Disney Company lists a 1-800 number on each of its DVDs that says if you break the DVD you can send the broken disk

to a listed address and they will send you a brand new copy at no cost. Is that true?

Mr. DAVID GREEN. That is absolutely right. Other companies are also looking at the same deal.

Ms. BONO. So that kind of maybe addresses a little bit of the fair use issue? I think the market place is trying to be fair and the motion picture companies are.

Mr. DAVID GREEN. They will send it back with no profit to themselves.

Ms. BONO. Thank you. Then also, Mr. Lessig, it is a pleasure to see you again, Professor. I enjoyed your work in front of the Supreme Court arguing against the Sonny Bono Copyright Act. I am glad that the Supreme Court in their infinite wisdom ruled with Sonny.

In any event, there are wonderful artists out there, Omar Liebert is one, who chooses to put his music on the web and to not copyright it. Artists can do that. There is something with software, shareware. People can put their technology, their ones and zeros, out there in a way that can be disseminated freely. Why not? And is your book copyrighted?

Mr. LESSIG. Again, yes, my book is copyrighted. But, in fact, when artists put their music up on the web, it is not copyrighted. It still is copyrighted.

Ms. BONO. Correct.

Mr. LESSIG. And the ability to use it still depends on getting permission first. Now, that is a general problem. The particular issue here is, as came out of the exchange with Congressman Otter, should you have to get permission to do what the law already gives you the right to do, namely, a fair use right. Again, we could argue.

Ms. BONO. Professor, I am going to jump on this because I think I did make you repeat yourself but, again, with an iPod, for example, I have a 40 gigabyte hard drive in my drive that is barely much larger than a cassette tape any longer. 40 gigabytes. That is thousands and thousands of songs that I can carry with me in my purse, I can carry it on a plane, I can put it in my car.

I guarantee you very shortly there will be adapters in a car to put your 40 gigabyte hard drive in there and you have got your whole library. This issue of fair use you have kind of antiquated. And when you talk about the Xerox machine, I think that is entirely disingenuous. A Xerox machine is not making a master copy of a master copy. You have used the Xerox copy analogy here and I think that is entire disingenuous.

Mr. Swift, one last question to you. When you make these CDs, which in your mind are master compilations of copyrighted works, you mean it is not worth the 99 cents that would go not to big business but to perhaps artists and people who have struggled and spent their entire life? You enjoy their work so much that you are willing to make copies to give to your friends or speeches, whatever you are copying.

It is not worth saying for 99 cents go to iTunes, go to MusicNet, go to even Napster now and buy the song? It means so much to you that you spend that time making copies but you are not willing to tell your friends to go spend the money to support the artist who created that work. Why is that?

Mr. SWIFT. I make a program and I give it to a friend. They are supposed to pay me for that?

Ms. BONO. No, no. You are supposed to pay the people.

Mr. SWIFT. I am supposed to pay. I have paid. I mean, I may have—

Ms. BONO. Okay.

Mr. SWIFT. I may have 30 CDs.

Ms. BONO. Okay, so they are supposed to pay the creator of the content. They can go to the Internet—

Mr. SWIFT. I give them a gift and they are supposed to pay—

Ms. BONO. That is not a gift. The copyrighted work is not a gift.

Mr. SWIFT. But if I give them that and they have to pay somebody, it would seem to me that the only way that would work is they would have to pay me.

Ms. BONO. No, they could go—

Mr. SWIFT. That is a violation of the copyright right there.

Ms. BONO. No, they wouldn't have to pay you. They could go to the record store. You could give them a list of your very favorite songs or they could go to a website and support these industries who have worked so hard at developing this.

Mr. SWIFT. No, no. I could say that you might really enjoy it if you bought these 30 CDs and you put these cuts together in this order.

Ms. BONO. You can post your list on the web. That is a very common procedure. You can post you—

Mr. SWIFT. Why would I want to do that?

Ms. BONO. My question exactly.

Mr. SWIFT. I want to make a program. I do lap fades, cross fades. I use portions of—

Ms. BONO. Which sampling is also suspect to me here.

Mr. SWIFT. My point is that what you are suggesting I do doesn't do what I want to do.

Ms. BONO. Well, sir, with all due respect, and I am sorry—

Mr. SWIFT. You are saying that I shouldn't be able to—

Ms. BONO. I plan to take your words today and hack them and butch them and put them on the Internet and do with them what I wanted to do and disseminate them but because—you say you take portions of copyrighted work and just send the portions out.

Mr. SWIFT. What I take is recordings I have paid for.

Ms. BONO. And?

Mr. SWIFT. And I put together different kinds of things for personal use. I don't do it for money. I don't sell these. I don't make a lot of copies because, among other things, it is a lot of work. Just creating the labels and sticking them on the blanks is a lot of work so I just don't. I have never done, I don't think, more than 10 of these. Okay? I am not a huge threat to this industry and—

Ms. BONO. Okay. But let us—

Mr. STEARNS. The gentlelady's time has expired.

Ms. BONO. Thank you, Mr. Chairman.

Mr. STEARNS. The gentleman from Texas.

Mr. GREEN. Thank you, Mr. Chairman. It is interesting because I have two minds on this because I can understand the need. Like I said, if I buy a CD for \$17 and I tell my kids I want to burn one

for them, that is different than what we are seeing in the massive piracy. That is what I am concerned about.

Let me ask Mr. Shapiro because looking at what we have now, when the DMCA was originally passed the rulemaking process involved a copyright office and the Library of Congress was established to identify certain exemptions under the DMCA anti-circumvention that would be in the public interest. While people may complain that there are only a few exceptions that have been granted, some have been granted in proving that there is a process. Can you envision a scenario where a rulemaking process possibly somewhat different would address the consumer electronics concern with the potential liability of the DMCA but still have the protection from the original artist or the creators of these works?

Mr. SHAPIRO. I think by most accounts that process has not worked. My understanding is there was only one exemption granted and it was for a group of the blind. It was fought every step of the way by the motion picture industry and it still doesn't allow the blind even that exemption to do what they want. The administration has made clear that process is not good and should be changed.

I don't think a technology creator should have to consult lawyers and go through an exemption process to produce technology. It is very dangerous. If we had that when the VCR was invented, then the VCR and so many other industries would not exist today. Blockbusters would not exist. A whole bunch of other industries would not be selling what they are selling.

The growth of technology is something that we can't predict what way it is going to go. The most dangerous thing about the way the copyright law has evolved over time is that it is focused on one half of the equation and that is compensating authors and artists and protecting that monopoly. The other half of the equation, the broad public access which the Supreme Court has repeatedly said is part of that constitutional provision, has been totally ignored. To the extent that technology allows broad public access, that is important.

Now, there are a bunch of studies which have been done focusing on technology and focusing on harm to copyright owners. In some areas there is harm to copyright owners. Certainly the radio put creators out of business. They put musicians out of business. The talking film put pianists out of business in motion picture theaters. I think even now it is a matter of debate whether downloading now is hurting the recording industry. The studies are split on that very point including one that just came out from Harvard.

Mr. GREEN. Well, I don't know if I agree that is on the level of abolishing buggy whips. We lost jobs back then, too. I think we have to protect both not only the innovation of the technology but also the innovation of whatever work is being done. Again, we are looking for that kind of balance.

Mr. Holleyman, your association represents both software manufacturers who have much to lose from online piracy, and also hardware manufacturers who traditionally oppose digital rights management mandates. Can you give us your insight? Because obviously you have to deal with that within your agency in some opportunities for the private sector, collaborative solutions to the digital

rights management and piracy. You could satisfy both content but also the hardware producers.

Mr. HOLLEYMAN. Well, I would like to think that our association represents both content and hardware producers because we do. We were very involved in the compromises that were struck in 1998 and feel that reasonable balance has worked well. What we have been able to deploy through that are very simple mechanisms that can be used with software and with PCs that will allow a consumer within 30 seconds with Internet access to authenticate their program.

It eliminates the biggest form of piracy of software which is not the piracy of software to sell in the commercial market place, but where legitimate customers may acquire one license but then they copy it for multiple PCs in their work place. That simple technology is the merger is what can be done with the PC with a simple Internet connection. It is not burdensome and it is what we have been able to do to help reduce piracy because of the DMCA.

Mr. GREEN. Is that same paradigm available for motion pictures and recordings? I am trying to think of how we could do that.

Mr. HOLLEYMAN. The DMCA contrary to ads that I think Mr. Shapiro's group and others were running at the time in 1998 which said that if the DMCA passed, it would outlaw PCs and VCRs. What we have seen since that time is that there has been a proliferation of content and digital devices unlike any other time in our history.

General purpose devices that can make copies like PCs have grown and can be used. It simply says that a special purpose device for purposes of circumvention has such a nefarious purpose and so little public interest that Congress would outlaw those special purpose devices. We think it has worked well.

Mr. SHAPIRO. Garage door openers?

Mr. GREEN. I am sorry. I couldn't hear.

Mr. SHAPIRO. I said garage door openers and printer cartridges are nefarious devices?

Mr. HOLLEYMAN. I think some of those cases involve issues unrelated to the DMCA provisions but other traditional copyright issues. I am not representing garage door and other device manufacturers.

Mr. STEARNS. The time of the gentleman has expired and I thank the panel. We have one more member. He is not a member of the subcommittee but generally we offer members of the full committee the opportunity to ask questions. The author of the bill, Mr. Boucher.

Mr. BOUCHER. Well, thank you very much, Mr. Chairman. I want to thank these witnesses for their perseverance here and their patients and for their enlightening us with their views.

First of all, let me simply note for the record that the Copyright Office has issued an opinion weighing the various factors that determine whether or not a particular application is fair use and has issued the opinion that making an archival copy is fair use. That was contained in the Section 104 report issued by the Copyright Office 2 years ago. We can say that based upon that opinion of the Copyright Office, you get to make at least the one copy for archival or backup purposes.

I think we would all agree that being able to excerpt small quantities of work from a copyrighted work to place in a school report or in a research paper, a video version of such, would be a fair use. Simply using this material in a way that does not impact the commercial market that is purely to enhance personal convenience or further education is indisputably a fair use.

Mr. Lessig, let me ask a couple of questions of you. Are you concerned that the Digital Millennium Copyright Act holds the potential for the extinguishment of fair use in the digital era?

Mr. LESSIG. Absolutely. Especially if one thinks beyond the questions we have been focusing on which might be thought of as the free bite of the apple questions, your extra copy questions. More fundamentally, the ability to use the technology to mix and excerpt and express content in a way that the copyright owner might not necessarily want you to do.

This is a problem, frankly, that fair use has independent of technology. In my testimony I spoke of a case where Robert Greenwald, a film maker, wants to take a 1-minute clip from the President's Meet the Press interview. NBC has banned him from doing this and he now has to face the very difficult choice of whether to risk copyright infringement for what I think all of us in this context would think should be fair.

Mr. BOUCHER. So what the law basically does is say that the creator of the content can lock that content behind a technical protection measure and then prohibit access to it except on whatever terms the content creator finds acceptable. That could be the making of a micropayment or something else.

Mr. LESSIG. The micropayment or terms that say you can't criticize in certain ways or you can't excerpt in certain ways, all of those are the type of freedoms that the law guarantees under fair use which are being removed by technological protection measures.

Mr. BOUCHER. Thank you. The fair use doctrine is a uniquely American doctrine. It was originated a little more than a century ago by the courts in the United States as a way to give expression to the rights of the users of intellectual property. The European community has never embraced this principal. It is really an American concept.

Do you see, Professor Lessig, any connection between the doctrine of fair use as practiced in this country and the lack of it in Europe and much of the rest of the world and the tremendous technological advances that we as a society have been able to make? Has fair use contributed to that?

Mr. LESSIG. Absolutely, for exactly the reasons that Mr. Shapiro was suggesting. The opportunity for businesses to build without getting permission first has driven an extraordinary amount of innovation and growth. I think people around the world in good faith are puzzled by the American doctrine of fair use. They are puzzled. They don't understand it. I don't think they are evil. I just think they don't have the same tradition. I think one of the ways to understand the resistance in the United States comes from the changing ownership of major media organizations. The RIAA, the major organizations represented by the RIAA, are all foreign organizations right now.

I have all the respect in the world for them but when one of the leaders, for example, from Universal, Larry Kinswell, says as far as fair use is concern, "It is the last refuge of scoundrels," that strikes me as someone who doesn't understand the American tradition and the values that fair use has served.

Mr. BOUCHER. Thank you. Ms. Nisbet, let me direct several questions to you. As a representative of libraries, are you concerned that the Digital Millennium Copyright Act could lead to a paper use society where things that are available for free on the library shelf today when delivered in future years in digital format would only be available to library patrons if they are willing to pay a fee in order to access the work every time? Are you worried about that?

Ms. NISBET. Indeed we are. Let me just say that is one of the reasons that we strongly support H.R. 107 because it will not only ensure that we continue to have fair use, but also that we are able to exercise the other exceptions in copy law that are there to ensure that we are able to use the products that we buy so that for our patrons they are free and are able to use fully in many different ways, particularly to support research and education.

Mr. BOUCHER. One final question.

Chairman BARTON. Mr. Chairman.

Mr. STEARNS. Yes.

Chairman BARTON. I would ask unanimous consent that since Mr. Boucher is the author of this legislation, although he is not a member of the subcommittee, that he be given an additional 5 minutes for questions of this panel.

Mr. STEARNS. Without objection so ordered.

Mr. BOUCHER. Thank you very much, Mr. Chairman. Both Mr. Chairman.

Ms. Nisbet, we have heard from the content owning community that the rulemaking process at the Copyright Office, which was inserted through amendments offered in this committee, as a matter of fact at the time that the DMCA was passed, is sufficient to protect fair use. We now have 6 years of experience with that rulemaking process at the Copyright Office. My sense is that it has proven to be all but unless in terms of protecting fair use rights.

I wonder what the librarian's position on the adequacy of that rulemaking process as the protector of fair use rights is? I would also ask you this. I know that a library community and the university community have made numerous requests to the Copyright Office under this rulemaking procedure for exemptions to protect fair use rights in association with what your patrons and university students and professors need to do with copyrighted material.

Have you ever been supported in any of those various applications to the Copyright Office for exemptions to protect fair use by the MPAA, by the RIAA, or by the Business Software Alliance? Have you gotten support from any of these groups with respect to that rulemaking process?

Ms. NISBET. We've gotten opposition. No support. I might add the libraries have been very disappointed in the rulemaking process but you don't need to look just to the libraries for criticism of that. The Librarian of Congress himself, as well as two Assistant Secretaries of Commerce have expressed concerns with the evidentiary

standard for that rulemaking and have expressed concerns about how well it works. We would agree with your assessment.

Mr. BOUCHER. Thank you very much.

Mr. Shapiro, members of this committee have had the opportunity to attend on various occasions the Consumer Electronics Show which is a showcase of American and, to some extent, foreign technological innovation. The world demonstrates its technological advances at that annual event.

Tell me this. How different do you think that show would look in the event that the DMCA can be used by individuals who are seeking not to protect their copyrights so much as to thwart competition coming from some other market participant? I have in mind the use of the DMCA to block competitive garage door openers, to block competitive toner cartridges for printers, and even to block making modifications for your own use in the robotic dog that you've purchased. In all of these instances the DMCA has been invoked. How different would your show look if the DMCA can run its course and be used in order to thwart legitimate competition?

Mr. SHAPIRO. Well, the DMCA is being used for that purpose. I am somewhat embarrassed because none of my own members are using it for that purpose. They are suing potential competitors. They don't want competitive products. The DMCA allows them to do that and that is one of the reasons we are asking it should be changed. Actually as an industry we support vigorous competition among different technologies.

The show would be a lot smaller. Indeed, it is somewhat smaller. ReplayTV, for example, was litigated out of existence under the DMCA. Now, as Professor Lessig noted, was that a valid lawsuit? We will never know because the reality is it cost so much to defend against one of these lawsuits that you can't go to logical extreme and even protect your fair use rights. To the extent that attorneys are starting to run the technology world, if that is a good thing, then we shouldn't support this legislation.

Mr. BOUCHER. Thank you. That is all the questions that I have of this panel. I want to thank you very much for your participation here today. We will be having further discussions with each of you as we further consider this matter.

Mr. STEARNS. I thank the gentleman and Panel 2 is excused. I want to thank you very much. You have been in the hotseat here. I appreciate your forbearance here and now we call up Panel 3: Mr. Gary Sherman, President of the Recording Industry Association of America; Mr. Peter Jaszi, Professor of Law, Washington College of Law, American University; Debra Rose, Senior Legislative Council, the Entertainment Software Association; Mr. Chris Murray, Legislative Counsel, Consumers Union with Ms. Gigi B. Sohn, President, Public Knowledge; last Mr. Robert Moore, Chief Executive Officer, 321 Studios.

I want to thank Panel 3 for your patience. We are eager to hear your opening statements. If you will come to the table and we will start with Mr. Sherman on my left and just go straight across. Each of you have an opportunity to give us your statement.

Mr. Sherman, if you are ready, we will start. Just make sure your speaker is on.

STATEMENTS OF CARY SHERMAN, PRESIDENT, RECORDING INDUSTRY ASSOCIATION OF AMERICA; PETER JASZI, PROFESSOR OF LAW, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY; DEBRA ROSE, SENIOR LEGISLATIVE COUNSEL, THE ENTERTAINMENT SOFTWARE ASSOCIATION; CHRIS MURRAY, LEGISLATIVE COUNSEL, CONSUMERS UNION WITH GIGI B. SOHN, PRESIDENT, PUBLIC KNOWLEDGE; AND ROBERT MOORE, CHIEF EXECUTIVE OFFICER, 321 STUDIOS

Mr. SHERMAN. Thank you, Mr. Chairman. My name is Cary Sherman. I am President of the Recording Industry Association of America. If you don't mind, I would like to chuck my oral statement which was a summation of my written statement and just—

Mr. STEARNS. You probably heard a lot today.

Mr. SHERMAN. I have heard a lot.

Mr. STEARNS. I can see a lot of you are a little frustrated but it has been a very intellectually challenging debate so, yes, sir. By unanimous consent your entire opening statement will be part of the record.

Mr. SHERMAN. Thank you. I would just like to make a handful of key points that I think are important less they get missed. First, the DMCA has been largely characterized today as being anticonsumer. I really feel that the experience is very much the contrary.

The fact is new technologies weren't being taken advantage of before by creators for fear that they would be pirated out of business and the DMCA fixed that. They said if you use technology to protect your content, it will be illegal to manufacture and sell devices to hack through the protection. They are just doing what the Congress did back in the 1980's with cable box legislation saying it would be illegal to manufacture black boxes that would descramble cable signals.

Nobody worried about a fair use exemption that somebody was going to use a movie that was going to be downloaded but they couldn't get access to it because it was scrambled. There have been no complaints and the cable industry has grown. The process has worked well.

If you look at the results of the DMCA in the music industry today we've got iTunes from Apple, we've got Rhapsody from Real, we've got Napster 2.0 from Roxio, MusicMatch, Wal-Mart, Best Buy. It goes on and on. In the future we still have coming Dell, Amazon, MTV. We now have Sony. Microsoft is getting into this business.

If you want to talk about proconsumer, think about DVDs. The fastest growing consumer product in history. It was made possible because technical protection measures were worked out between the consumer electronics industry and the motion picture industry. If H.R. 107 were law, that protection technology would have been pointless and you wouldn't have DVDs today.

That is why I have trouble understanding Mr. Shapiro's position. It was his members who reached an agreement with the motion picture studios on how they could jointly put this new consumer product into the market place which consumers have loved. The

record industry negotiated a similar arrangement with consumer electronics companies and it allows for some copying, CD quality copies of DVD audio disks, but it was a negotiated agreement that has facilitated new formats.

It was a very good deal for the consumer electronics companies. They have sold scads of DVD players. Is Mr. Shapiro now saying that the agreement his company reached on DVD standard should now be breached so that those same companies can now sell the devices that strip away the very protection they agreed to respect? I certainly hope now. I think the DMCA has vastly benefited consumers and will continue to do so.

Second, there has been an impression created that the DMCA disallows fair use. In fact, it allows consumers who legally acquire a copy to make a fair use copy and you have a triennial review process to provide even further assurance that fair use rights are not lost.

The DMCA only prohibits companies from selling black boxes to strip away content protection for any purpose. The fair use issue was very well understood back in 1998 and was much discussed, but everyone recognized that an exception allowing black boxes for fair use would not just be a loop hole, it would swallow the rule.

This bill is not going to benefit consumers but the companies who want to sell hacking tools. I think we all know how those tools will be used which brings me to my third point. Everyone has made their obligatory statements about how they are against commercial piracy and commercial piracy is a serious and growing problem.

Let's be honest, the issue we are facing nowadays is not just commercial piracy. It is consumer copying, downloading and burning. Ordinary consumers have become worldwide distributors of our content. I respect Mr. Swift's personal perspective but it assumes that everyone is like him and we have learned the hard way that they are not. Our sales are down 31 percent in 4 years.

Four years from the time that peer-to-peer networks began and CD burners became common place. Everybody has been talking about all the changes since 1998 when the DMCA was enacted. What has happened to the music industry is an extraordinarily profound change and imagine what it would have been if H.R. 107 had provided even less protection for us.

Everyone is relying on misconceived and incorrect interpretations of fair use to justify their behavior. These consumers who are downloading and burning think it's buy one and get one free, or worse buy one and get 100 for everyone else, everybody in the class. That's why H.R. 107 is so misleading, because under the rubric of fair use, which has been vastly exaggerated as you seen from the discussion in the earlier panel, almost anything is okay.

By the way, I think that explains the quote that Mr. Lessig gave from a record company executive out of context about fair use being the refuge of scoundrels because it is constantly being distorted in order to routinely justify infringement by companies like Napster and Aimster and Grokster and KaZaA and so on and so forth. H.R. 107 is really about getting creative content for nothing and that, unfortunately, is the reality.

Finally, no one has talked about the market place, yet that is why all these claims and issues have to be resolved, not by Govern-

ment regulation. As far as record companies are concerned, all that matters is how they appeal to consumers, how they give them what they want so they will buy our product instead of take it.

That is why record companies allow extra copies to be burned. All of the discussion this morning about no copies can be made, that just has no application in the music industry whatsoever. CDs are being burned beyond belief.

Download services allow copying. They allow copying to multiple computers. They allow transfers to portable devices. They allow burning to CDs. This is the market place at work and that is where the solution really lies. The DMCA is enabling consumers to pay different prices for different uses of entertainment.

From purchasing complete CDs to downloading singles to monthly subscription services, the market place is addressing what consumers want and expect. Not everybody wants to own their music and not everybody should have to pay for what H.R. 107 thinks everybody should have. I think that is exactly the point that Mr. Shadegg was just making before.

Consumers are benefited by options, not an abstract and misguided guarantee of a technical ability to make unlimited copies. Those options have been and should continue to be created by the legitimate market place, not by Government regulation. Thank you very much.

[The prepared statement of Cary Sherman follows:]

PREPARED STATEMENT OF CARY SHERMAN, PRESIDENT, RECORDING INDUSTRY ASSOCIATION OF AMERICA

Chairman Stearns, Ranking Democratic Member Schakowsky, and Members of the Subcommittee, my name is Cary Sherman, and I am President of the Recording Industry Association of America (RIAA). Thank you for inviting me here today to discuss H.R. 107 and its potential effects on the development of and investment in sound recordings in the United States. RIAA is the trade group that represents the U.S. recording industry. Our mission is to foster a business and legal climate that supports and promotes our members' creative and financial vitality. Our members are the record companies that comprise the most vibrant national music industry in the world. RIAA members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States. They employ thousands of people, including singers, musicians, producers, sound engineers, talent scouts, graphic designers and retail salespersons, to name only a few.

Music is the world's universal form of communication. It touches every person of every culture on the globe, and the U.S. recording industry accounts for fully one-third of that world market. Exports and other foreign sales account for over fifty percent of the revenues of the U.S. record industry. This strong export base sustains American jobs.

In this respect, the protection of our intellectual property rights is vital to promoting America's competitive advantages in world commerce. As our trade deficit has soared, the contributions of America's copyright industries to the U.S. economy has become even more important.

An important part of our nation's competitive strength lies in the creation of knowledge-intensive intellectual property-based goods and services. This is one of those economic activities that Americans do better than the people of any other nation. The "core" U.S. copyright industries account for more than five percent of US GDP. Employment in our industries has doubled over the past 20 years, growing three times as fast as the annual growth rate of the U.S. economy as a whole. The foreign sales and exports of U.S. copyright industries were nearly \$90 billion in 2001, an amount greater than almost any other industry sector, including automobiles and auto parts, agriculture and aircraft.

In a sense, the intellectual property of the United States is like a warehouse of ideas and creativity. For people to disregard intellectual property rights is no more tolerable than to allow the theft of physical goods.

The theft of music is almost as old as the music industry itself, but the advent of the compact disc radically altered the nature of music piracy—providing the pirate producer with the opportunity to produce near perfect copies of any recording. We already suffer from massive trafficking in illegal CDs; the proliferation of cheap recorders and recordable optical discs (CD-Rs) in recent years has served to create an easy and hard-to-detect means of mass duplication.

Annual world-wide pirate sales approach 2 billion units, worth an estimated \$4-\$5 billion. Globally, 2 in 5 recordings are pirate copies. Total optical disc manufacturing capacity (video/audio CDs, CD-ROMs and DVDs)—stands at well over 20 billion units, having quadrupled in the past five years, and greatly exceeds legitimate demand. You can see why allowing the manufacture and distribution of machines that strip away copy protection and permit the making of unlimited copies poses risks for mass duplication that would make the piracy problem even worse.

With the enactment of the DMCA in 1998, Congress went to great lengths to balance the interests of copyright owners and users of their works. The DMCA encourages copyright owners to make products available to consumers in the digital environment by prohibiting the trafficking in hacking tools that disable the technical protection measures copyright owners rely on to prevent the mass reproduction of their creative works. On the other hand, to ensure that legal uses of copyrighted works (such as uses that stem from First Amendment protection) are not adversely affected by access controls that are too limiting, the DMCA imposes a continuous three-year review process by the Librarian of Congress and the National Telecommunications and Information Administration (NTIA).

HR 107 destroys this balance of interests and the protections Congress so carefully crafted. The amendments contained in this bill create not merely a loophole, but an exception that swallows the rule, leaving copyright holders and content providers with no way to protect the works they create.

Because of the DMCA, we now have new legitimate Internet music services such as Apple's iTunes, Real's Rhapsody, MusicMatch, Roxio's Napster 2.0, Wal-Mart's service backed by Liquid Audio, Sony's Direct Connect, Music Now, Best Buy, buymusic.com and other services, with plans for many more such online businesses from competitors like Amazon.com, MTV, Dell, Hewlett-Packard and Microsoft—all of which use Digital Rights Management, or technological protection measures, to protect the delivery of the music. All of these businesses are meeting consumer expectations in the marketplace in different ways, allowing flexibility while preventing mass infringement. This is the marketplace, and competition, at work.

HR 107 would allow the sale of hacking tools that would bust through the Digital Rights Management of iTunes and other services if the hacker is using the copies for "non-infringing purposes." There are two glaring problems with this proposal:

First, there is no way to assure that the tool ONLY makes non-infringing copies. The only way to do so—and even that would not guarantee success—is to impose a tech mandate for copy controls, which HR 107 does not contain.

This leads to the second problem—Enforcement. It is impossible to monitor private copying to assure that copies are made only for non-infringing uses. A technology or tool which provides circumvention for "non-infringing" purposes necessarily provides circumvention for *any* use, including blatantly illegal ones. There is simply no way to control how the means to circumvent is used once the tool is in the hands of a user. In fact, Rep. Boucher conceded this fact when he introduced H.R. 107. He said:

"I recognize that because the determination of whether or not a particular use is considered a "fair use" depends on a highly fact specific inquiry, it is not an easy concept to translate into a technological implementation."

Cong. Rec. E 21 (Jan. 8, 2003).

Unfortunately, Rep. Boucher drastically understated the problem. It is not only "not easy" to create a technology that will permit "fair uses" while prohibiting other uses; it is, at present, impossible.

It is important to distinguish between "fair use" and "free access." It is not a defense to copyright infringement to illegally gain access to a work, whatever the motivation. You cannot steal a CD from a record store in order to make a fair use copy of a portion of it. You cannot break into a library to make fair use of a book. HR 107 would blur this distinction and allow the use of devices to circumvent controls that regulate original access to a copyrighted work.

While this bill is proposed under the banner of consumer rights, consumers will, in fact, be hurt if it were enacted. Members of the music community strive to provide consumers with many different ways of accessing our content. Allowing "free-riders" access to our music by enabling circumvention will raise the costs to honest consumers, and limit the incentive and ability of providers to invest in, and offer, new technology and digital media alternatives.

The DMCA is enabling consumers to pay different prices for different uses of entertainment. Not all consumers desire to pay for complete access to material. Some may want to access entertainment only one time, or for a week or a month. In the case of music, some may want a subscription that allows them access when they desire it without the burden or cost of acquiring a permanent copy.

Currently, download music services provide for permanent copies on a track by track basis or an album basis; the ability to share the song with some other computers; the ability to burn a copy onto a CD-R; and the ability to transfer the song to portable digital music players. In other words, the marketplace is addressing what consumers want and expect, and that's how it should be.

Consumers are benefited by options, not an abstract and misguided application of the ability to make numerous copies. Those options have been, and should continue to be, created by the legitimate marketplace—not by government regulation.

H.R. 107 is a solution in search of a problem. Our own success depends upon the ability of our consumers to access and enjoy our music. If consumers don't think a product at its price point offers enough value—and one of the ways consumers measure value these days is the flexibility they get to use the product in different ways—then the product will not sell.

The labeling provisions of H.R. 107 likewise pose a solution in search of a problem. Record companies are committed to giving consumers the information they want and need before buying a copy-protected CD, DVD-A, SACD, or other optical disc product. Just over a dozen copy-protected CDs have been released commercially to the public in the United States. The typical copy-protected CD contains a prominent label that informs the consumer about the copy protection. In this case, just as in the case of meeting consumer expectations with regard to flexibility on digital services, consumers will measure value by how well they are able to use the product in different ways. The marketplace is once again working, just as it should.

We continue to work with technology providers to give consumers more choices and greater control over how they access and use digital content and we are committed to providing information to consumers about these products. But our continued ability to offer choices and personal control relies upon the protection afforded by digital technologies. By allowing unimpeded circumvention of these protections with the empty and unenforceable directive to only make non-infringing copies, HR 107 lays waste to the effective—and balanced—DMCA.

We are suffering from piracy. This bill goes in the wrong direction by promoting it. We urge you to oppose it.

Thank you.

Ms. BONO. Thank you, Mr. Sherman.

Mr. Jaszi.

STATEMENT OF PETER JASZI

Mr. JASZI. I teach domestic and international—

Ms. BONO. Please remember the microphone.

Mr. JASZI. I teach domestic and international copyright law but I am testifying today for the Digital Future Coalition, a group of 39 trade associations, nongovernmental organizations and learned societies that I helped organize almost a decade ago.

Our constituents make and use copyrighted works so they support both strong intellectual property protection and fair use. The DFC strongly endorses H.R. 17 because it would protect citizen's freedom of expression and right to make personal use of digital material. I have five main points.

First, this is not a debate about peer-to-peer file sharing. It is a debate about freedom and fairness. Back in 1988 with the intent to provide new protection against digital piracy and black box devices which are specifically designed or marketed to facilitate piracy, Congress temporarily lost sight of the historic values of American copyright law.

To an extent, no one foresaw the DMCA was a radical departure from norms established over 200 years of legal tradition. Rather than just cracking down on piracy, the anti-circumvention provi-

sions of the DMCA overrode fair use and the other time-honored limitations on copyright effectively damaging the freedom of consumers to engage in otherwise legal activities.

Today it would be illegal, as we heard, for a parent to use circumvention technology to edit out unsuitable material from a child's DVD. It would be unlawful for a child to take a brief excerpt from a copy protected electronic encyclopedia to include in a multimedia school report. And it would be a violation of Section 1201 for a computer science class to test scrambling technology meant to block terrorists from accessing first responder communications.

Contrary to the expectations of many, Section 1201's saving clause and the Library of Congress rulemaking it provides for have done nothing to bring fairness back to our copy right system. H.R. 107 represents the best and possibly the last chance that Congress will have to repair the unintended damage done by the DMCA and to help restore public respect for copyright which this overreaching legislation has done so much to undermine.

Second, the traditional norms of copyright law from which the DMCA departs so notably have served the country well. Copying for fair use has long been essential to the growth of our society both commercially and culturally, although it is easy and sometimes convenient to forget Hollywood owes much of its long record of classic motion picture productions to fair use.

Without fair use our high tech industry could never have become the envy of the world. Without fair use and the other exceptions in the copyright act, none of us in this room would have had the chance to learn through the use of books and other materials made available in libraries, schools, and universities.

American copyright has succeeded in promoting the progress of science and useful arts precisely because along with strong protection it also provides for limitations and exceptions in favor of users. In 1998 we lost sight of the essential place of fair use including personal use which is the historic heart of the doctrine.

H.R. 107 would correct this lapse by providing if one of your constituents like the parent or the school child I just described avoids a technological protection measure to make an otherwise lawful use he or she would have no civil or criminal liability. Meanwhile, those who circumvent in order to infringe would be subject to the full range of enhanced penalties provided in the DMCA and this is only fair.

Third, H.R. 107 will promote electronic commerce for the benefit of all content owners, the vice manufacturers and every other group represented in this room today. The DMCA works to benefit only a few industries under H.R. 107 in the world of fair use and strong intellectual property protection society as a whole will benefit.

You have heard from other witnesses that you must choose between the promotion of information commerce and fairness to information consumers but the choice is a false one. Thus, for example, H.R. 107 assures that consumers will not be mislead into buying digital products that will not permit the full range of use as otherwise allowed in copyright law again. This is only fair.

Fourth, enactment of H.R. 107 will guarantee your constituent's freedom to make lawful use of media products that they own. The

bill will enhance their ability to move the materials they have lawfully acquired among digital devices in the extended home environment. When consumers can use digital products more flexibly, they will place greater value in this new medium and as the value of digital products increases, the market for them will expand to the benefit of all parties including the creators of music, video, and text.

H.R. 107 will assure that what consumers are theoretically permitted to do will be practically possible by making sure that end users can get the tools they need to engage in permitted practices. By incorporating the Supreme Court's time tested Sony Betamax standard this part of the bill gives courts the tools they need to make sure that vendors of true black boxes that were the intended target of the DMCA cannot avoid the full weight of the law. This, too, is only fair.

Fifth, cybersecurity is more important today than ever before. When the DMCA was enacted Congress clearly tipped the scales toward protection. After 9/11 we need to eliminate obstacles to the research and testing so important to our collective security. H.R. 107 carefully calibrates the balance of intellectual property—

Ms. BONO. Excuse me. Can you sum up in about 15 seconds?

Mr. JASZI. [continuing] to allow additional research without unduly compromising protection. Congress should seize the opportunity presented by H.R. 107 to restore the historic balance founded on freedom and fairness that the DMCA has disturbed.

Madam Chairman and members of the subcommittee, the constitution defends our freedom to read and share books, magazines, music, and other materials in 2004 just as it did in 1904. Today we are asking Congress to defend the consumer's use of educational and cultural materials in the best interest of the public. Thank you.

[The prepared statement of Peter Jaszi follows:]

PREPARED STATEMENT OF PETER JASZI, DIGITAL FUTURE COALITION

On behalf of the Digital Future Coalition, I thank you for giving me the opportunity to express our support for H.R. 107. For 25 years, I have taught copyright at the law school of American University here in Washington, D.C. At the outset, I wish to stress that I am not speaking today on behalf of AU, but rather am testifying in my personal capacity and for the DFC, which I helped found nearly a decade ago.

The DFC is a coalition of 39 trade associations, non-governmental organizations and learned societies that was organized during the run-up to the Digital Millennium Copyright Act of 1998. (A list is attached to this testimony.) Its members represent a broad cross-section of the educational, high-tech and consumer communities in the United States. The constituents of the DFC are creators and users of text, images and music, so they understand first-hand the importance of laws that achieve a balance between rightsholders' legitimate interests in strong protection and the public's interest in reasonable access to copyrighted works. Our members support both fair use and intellectual property protection. Thus, the DFC strongly endorses H.R. 107, introduced by Mr. Boucher and Mr. Doolittle, because it would enhance consumer freedom and choice by restoring balance to our copyright laws.

Before talking in detail about how we got to where we are today, I would like to make five points for your consideration.

First, H.R. 107 presents Congress with the best and possibly last clear chance—before it is too late—to reverse the unintended damage done to our copyright system by the enactment of Section 1201 of the DMCA.

Second, for over a century and a half, the "fair use" of copyrighted materials has been essential to the growth of our society both commercially and culturally. Without fair use, Disney could never have made all the great movies that draw on mod-

ern retellings of classic fairy tales. Without fair use, our high tech-industry could never have become the envy of the world. And without fair use and other exceptions in the Copyright Act none of us in this room would have had the chance to learn through the use of books and other materials made available in libraries, schools and universities throughout the Nation.

Third, this Committee can promote electronic commerce for the benefit of everyone—content owners, device manufacturers, and every other industry group sitting in this room today—by properly balancing the rights of both copyright owners and information consumers. In a world of fair use *and* strong intellectual property protection, society as a whole will benefit.

Fourth, enactment of H.R. 107 will ensure fairness to your constituents by guaranteeing their freedom to make lawful use of media products they own. The DMCRA will enhance their ability to move the materials they have lawfully acquired among digital devices in the home and in the extended home environment, including their cars and vacation houses. When consumers can use these digital products more flexibly, they will place greater value in this new medium. And as the value of digital products increases, the market for them will expand to the benefit of all parties, including the creators of music, video and text.

Fifth and finally, in a post-9/11 world, our priorities must change. Cyber-security is more important today than ever before. I'm not suggesting that we abandon intellectual property protection altogether. But the balance must be recalibrated. Prior to 9/11, when the DMCA was enacted, Congress clearly tipped the scales towards protection. But now, post 9/11, we need to eliminate obstacles to the research and testing so important to our collective security. H.R. 107 carefully recalibrates the balance to allow additional research without unduly compromising intellectual property protection.

THE SPECIAL GENIUS OF U.S. COPYRIGHT LAW

Let me begin by describing some of the important characteristics of our copyright system as it stood before October 1998. First and foremost, that system had been extraordinarily successful in furthering the goal the Constitution sets for it: the promotion of “progress” in “Science and useful Arts.” In the two centuries following the enactment of the first Copyright Act in 1790, the United States enjoyed an unequaled and unbroken record of progress that gave us, on the one hand, educational institutions and research facilities that are preeminent in the modern world, and on the other, entertainment and information industries that dominate the global marketplace. Schools, libraries and archives benefitted from the operation of our copyright system, and the public reaped the reward; likewise, expanding American publishing, motion picture, music and software businesses generated not only wealth but also less tangible forms of public good. And this was as it should be. From its inception, the copyright system has operated both as a force for cultural development and as an engine of economic growth.

The success of traditional U.S. copyright law was not due only to the extremely high levels of protection it has afforded to works falling within its coverage. That success also stemmed from the fact that strong protection consistently has been balanced against use privileges operating in favor of teachers, students, consumers, creators and innovators who need access to copyrighted material in order to make—or prepare to make—their own contributions to cultural and economic progress. To put the point more simply, the various limitations and exceptions on rights that traditionally have been a part of the fabric of copyright are not results of legislative or judicial inattention; rather, these apparent “gaps” in protection actually are essential features of the overall design. As the Supreme Court observed more than a decade ago, in its *Feist* decision, the limiting doctrines of copyright law are not “...unforeseen byproduct[s] of a statutory scheme...”, in fulfilling its constitutional objective, copyright “assures authors the right to their original expression but encourages others to build free upon” preexisting works. And, as the Court recently has reaffirmed in *Eldred v. Ashcroft*, these limiting doctrines are the mechanism by which copyright law recognizes and implements the values of free expression codified in the First Amendment.

Over the years, U.S. copyright law has built up a catalogue of limitations and exceptions to copyright protection, including:

- The “idea/expression” distinction, which assures (among other things) that copyright protection does not attach to the factual contents of protected works;
- The “first sale” principle, codified in 17 U.S.C. Sec. 109(a), which assures that (as a general matter) purchasers of information products from books to musical recordings can sell or lend their copies to others;

- A variety of specific exemptions for educational, charitable and other positive public uses; and, most importantly,
- The “fair use” doctrine, found in Sec. 107, which provides—in essence—that some other unauthorized uses of copyrighted works, not specifically covered by the limitations just summarized, should be permitted rather than punished because their cultural and economic benefits outweigh the costs they might impose on copyright owners.

This particular idea of “fair use” has been a central and unquestioned feature of U.S. copyright law since 1841, when Joseph Story announced the doctrine in the case of *Folsom v. Marsh*. In a less technical sense, of course, *all* uses authorized under *any* of the limiting doctrines are “fair” ones in the collective judgement of two centuries of judges and legislators about how to strike the balance in copyright law. H.R. 107 would restore the vitality of all of these traditional doctrines, which currently are impaired or threatened by the anti-circumvention provisions of the DMCA. By restoring the freedom of consumers and other information users to make reasonable uses of purchased copies of works in digital formats, H.R. 107 would re-establish fundamental fairness in our intellectual property law.

8THE BENEFITS OF BALANCE

Before describing more fully the threat that Sec. 1201 of the DMCA poses to freedom and fairness—and how H.R. 107 addresses it—it may be useful to provide some more specific illustrations of how balance in copyright law has served the twin goals of cultural and economic progress. It is common to note the self-evident proposition that the non-profit educational and library sector depends on limiting doctrines for many essential functions. Although schools and libraries are among the largest purchasers of copyrighted materials in the United States, their most typical and beneficial activities, from classroom teaching and scholarly research to the lending of books and other materials, would not be possible without the built-in fairness safeguards that limitations and exceptions to copyright provide.

It is less frequently noted that such major information industries as motion pictures and computer software came into being not despite the fact that filmmakers and programmers were free to copy important elements of their predecessors’ work, but because of it, and that they have continued to prosper under these conditions; likewise, is critical to a wide range of practices within the publishing and music industries. It would not be going too far to say that the creativity and innovation that copyright exists to promote are fueled as much by the “gaps” in the law as they are by its strong protections; this is a point that individual creative artists understand well from direct personal experience—even though large copyright-owning media companies sometimes lose sight of it. Although the entertainment industries are legitimately concerned about “piracy” of copyright works, it is important not to confuse the activities they rightly condemn with the ordinary, lawful exercise of use privileges conferred by the Copyright Act itself.

Equally important, limitations and exceptions to copyright law operate to the direct and immediate benefit of consumers. It is because of these limiting doctrines that we all can make a broad range of personal uses of the contents of information products we purchase, without fear of legal liability. Thus, to cite only a few obvious examples, students can copy texts or images from published sources to enhance a term paper or homework assignment; book buyers can dispose of unwanted volumes at a charity sale; and music fans can combine selections from their personal record collections to make “mixes” for a family member’s birthday or anniversary celebration, without any concern that by doing so they will violate traditional copyright principles. Nor is this all. Ultimately, it is the freedom to read, listen and view information products assured by these limiting doctrines that enables many consumers of copyrighted content to become producers—to move from absorbing and repeating the words, images and notes of others to making their own creative contributions to the general fund of cultural resources.

THE BACKGROUND OF THE DMCA—PIRACY AND “BLACK BOXES”

In the debates leading up to the Digital Millennium Copyright Act of 1998, Congress heard that copyright piracy was a growing domestic and international threat, and that digital technology exacerbated that threat. It heard, too, that copyright industries were beginning to use technological measures to protect themselves against piracy—something that they had and have every right to do. And it heard that there are different reasons why someone might want to avoid or “circumvent” such technological protections: bad reasons, like the large-scale unauthorized redistribution of copyrighted works, and good reasons, like discovering the structure of a dangerous computer virus, or making public the text of a password protected file detail-

ing corporate wrongdoing, or commenting on an encrypted text in a work of scholarship, or making electronic texts available to library patrons who live far from a bricks and mortar branch—all the latter being otherwise lawful activities and as far as can be from “piracy,” however that term is defined. The record shows that Congress acted on the understanding that it was cracking down specifically on circumvention in aid of piracy and on what might be called “bad faith” circumvention devices—that is, “black boxes” designed and marketed specifically to facilitate copyright infringement, whether offered to the public as such or under some justifying pretext.

In fact, the Congress did much more, creating a new legal environment in which many traditional and intentional “gaps” in the copyright system can be effectively filled by legally-enabled technological measures. For example, if encryption prevented a student from taking a single digital image from an article to use in an electronic term paper, the DMCA would effectively bar circumvention for that purpose, even though it would represent a core in conventional copyright analysis. Even if we could imagine a device that would have the sole and specific purpose of avoiding technological measures to enable this kind of core “fair use,” Sec. 1201(b) would make it unavailable; in banning technologies, that section asks only whether they are made available for circumvention purposes—not whether they abet “good” circumvention or “bad” circumvention.

THE IMPACT OF THE DMCA

The anti-circumvention provisions of the DMCA are a blunt instrument. Today, for example, it would be illegal for a mother to use circumvention technology to skip past promotions for other movies at the beginning of a DVD, whether because she deems them inappropriate for her young children or after she herself has been forced to see the same ads over and over. It would be unlawful for a child to make a one-minute digital excerpt from a copy-protected electronic encyclopedia to include in a multimedia project for a school music class. Similarly, it would be a violation of Sec. 1201 for a professor of computer science to work with his class to test scrambling technology meant to block terrorists from accessing sensitive first-responder communications.

In the anti-circumvention provisions of the DMCA, Congress put 200 years of legal, cultural and economic achievement at risk. Rather than promoting long-term security for copyright owners, the DMCA has actually done the opposite. Its enactment has helped to trigger a disastrous public decline in the public respect for copyright on which the success of our system depends. H.R. 107 would undo this misstep—preserving the essential features of Sec. 1201 while correcting its excesses.

It is notable that, in the last five years, most of the publicized invocations of Sec. 1201 have had nothing whatsoever to do with copyright piracy. Instead, we have seen the anti-circumvention provisions used (or their use threatened) to restrict ordinary consumers’ abilities to do with lawful digital copies of works in analog media the same things they are accustomed to doing with analog copies: to prevent them from copying recordings of music for personal use, playing European video games in the U.S., skipping offensive portions of a recorded movie in the course of playback, or even reading a book when and where the reader likes—if it happens to be an e-book. Perhaps most remarkably, the DMCA has been invoked in an effort to keep a small company from bringing a universal garage door opener to market and another company from offering consumers a cheaper cartridge for their home printers. This should be of great importance to this Committee. A wide range of products, from toaster ovens to jet aircraft, contain software embedded in microchips. How the courts apply the DMCA in these cases will have an enormous impact on competition in the aftermarket for all these products.

Likewise, the DMCA has been invoked to suppress important research and critical commentary on computer security systems and other software. This is no trivial matter. Although the DMCA includes narrow exceptions for security testing and encryption research, the world of 2004 is very different from the world of 1998. We now have a far greater understanding of the importance of cyber-security, and of the danger we all face from cyber-terrorism. Regardless of what one thinks of Richard Clark’s recent book, it is significant that while still in the White House he recognized the inadequacy of the DMCA’s exceptions and called for an amendment to the DMCA precisely because of its harmful unintended impact on cyber-security research and development.

Even farther afield from piracy, the act’s provisions have been manipulated in efforts to create *de facto* monopolies in computing hardware and a general purpose prohibition on computer network access. In sum, far from promoting the cultural

and economic progress that intellectual property laws exist to foster, most invocations of the DMCA have had just the opposite effect.

It is crucial that in our anti-circumvention legislation we now attempt to find our way back to the basic values of American copyright. If we do not, we can only expect further excesses in the use of Sec. 1201: to prevent journalists from publishing copy-protected documents obtained from whistle-blowers, or consumer advocates from investigating the efficacy or safety of new products incorporating computer programs; to undermine the ability of teachers to make otherwise lawful use of digital works in network-based lessons; to exact license fees from students quoting electronic content in their schoolwork; or to put high-tech bars around non-copyrighted facts that the Supreme Court has said should be free for all—this last perverse result being possible because current law bars the circumvention of technological measures applied to protected works *as a whole*, even those containing mainly unprotected facts with a small amount of original commentary. Under existing Sec. 1201, technological measures could even be used to ration the availability of electronic books to young people in rural communities, for whom library websites on the Internet are likely to become an important information lifeline.

The last example is not a far-fetched one. If our goal is to preserve fair use and the other important use rights in copyright law, we cannot do so simply by safeguarding existing practices. In 1970, few could have foreseen how new decompilers would empower software development; in 1980, most of us could not have guessed at the importance of time-shifting using home video-recorders; and in 1990, the use of thumbnail images on the web—the display of which was recently determined by the Ninth Circuit Court of Appeals to be a —was unknown. Sweeping, general anti-circumvention legislation threatens the development of new—as yet unimagined—ways for students, consumers, innovators and others to share fully in the fruits of the information revolution. Eliminating this threat is not a matter of *expanding* users' rights, but of carrying them forward into a new technological setting.

THE INADEQUACY OF THE DMCA'S SAFEGUARDS

From the legislative history of the DMCA, it appears clearly that not only did members of Congress in general—and the Energy and Commerce Committee in particular—understand that by enacting Sec. 1201 they were striking a blow against piracy and black boxes, but also that they shared a general concern about the fate of fair use under the new anti-circumvention regime. At that time, many members (as well as a number of academic observers of intellectual property legislation) believed that the “savings” provision of Sec. 1201(c) would operate to preserve traditional copyright values in this new context.

Unfortunately, this has not proved to be the case. Authoritative judicial interpretations have made it abundantly clear that there is no fair use exception to Sec. 1201, and that the savings provision actually saves nothing of real significance; properly understood, it merely states the truism that this “paracopyright” legislation (as anti-circumvention rules sometimes are termed) does not have a *direct* effect on the operation of the underlying copyright law itself. As has already been indicated, however, the real cause for concern is the *indirect* effect of the legislation on the traditional use privileges that it makes difficult or impossible for consumers to exercise in practice. Likewise, the narrowly defined exceptions to the anti-circumvention regime provided in Secs. 1201(d)-(j), although they provide adequately a few specific areas of traditional fair use (such as decompilation for reverse engineering in computer software development) are largely unavailing for most information consumers and innovators.

Moreover, the periodic Library of Congress rule-making provided for in Sec. 1201(a)(1) has proven wholly inadequate as a mechanism to counter the threats that anti-circumvention laws pose to traditional use privileges. This rule-making procedure is marked by several major shortcomings. First, as interpreted by the Copyright Office, the grant of authority to craft new exceptions applies only to descriptive categories of works (like encyclopedias, or computer operating system programs, or popular novels) rather than functional ones (like works important to scientific research, or subject to “thin” rather than “thick” copyright protection). This constraint alone makes the task of crafting meaningful exceptions difficult or impossible.

Were this not enough, where the issue of harm is concerned the Copyright Office's interpretation of the statutory grant imposes an exceptionally high standard of concrete proof on the proponent of any new exception. In an environment of rapid technological and commercial change, the practical effect of this standard is crippling. This problem is so acute that in October 2000, following the first rule-making, the Librarian of Congress wrote to ask Congress “to consider developing more appropriate criteria for assessing the harm that could be done to American creativity by

the anti-circumvention provision . . .,” stating that “[a]s presently crafted, the statute places considerable burdens on the scholarly, academic, and library communities to demonstrate and even to measure the required adverse impacts on users.” Similarly, the Assistant Secretary of Commerce, with whom the Copyright Office must consult concerning the rule-making, wrote in August 2003 that the standard employed by the Copyright Office “imposes a significantly heightened burden on proponents of an exemption, and is therefore inconsistent with the opportunity that Congress intended to afford the user community.” It is noteworthy, therefore, that although numerous instances of harm from anti-circumvention were presented to the second rule-making proceeding, completed in 2003, only one very limited new exception (for e-book editions programmed to exclude literally all uses by disabled readers) emerged from the lengthy and carefully conducted process.

Finally—and perhaps most significantly—any exceptions to Sec. 1201(a)(1) allowed by the Librarian are likely to be hollow promises, because other provisions of the DMCA (not subject to the rule-making) still make the technology to implement them unavailable. The modest carve-out for the circumvention of obsolete technological measures in the year 2000 rule, for example, is of no value to anyone who cannot build the necessary circumvention tools for himself or herself.

THE ALTERNATIVE APPROACH OF H.R. 107

Because it takes the dynamism of information use practices and information technology fully into account, the approach of H.R. 107 can succeed where other ways of making space for consumers and competitors within an anti-circumvention regime inevitably will fail. As has previously been noted, Congress intended in 1998 to crack down on copyright piracy and the market in black boxes. As revised by H.R. 107, Sec. 1201 would continue to be tough on both. But the bill also would restore the balance of copyright by assuring that tomorrow’s consumers and innovators can employ the best technology to read, view, listened to and learn from material created by others. It accomplishes this in four straightforward provisions:

- The CD labeling language assures that consumers will not be misled into buying digital products that will not permit the full range of uses otherwise allowed in copyright law. (Proper labeling actually would diminish a consumer’s need to circumvent. If a consumer purchases a product only to discover that it will not play on his computer, that consumer might consider circumventing the technological protection in order to get his money’s worth. However, if the product were properly labeled, the consumer would not buy it in the first place.) Alone, however, this is not enough. Thus, other provisions of the bill would modify Sec. 1201 itself.

Sec. 1201 now applies civil and criminal penalties to circumvention for any and all purposes, good or bad, unless they are covered by a few narrowly defined exceptions. Thus, H.R. 107 also includes:

- A new exemption for computer security research that is broad enough to cover a wide range of activities crucial to the progress of science—and the national defense;
- Amendments to Sec. 1201(a)(1) assuring that consumers will never be sued or prosecuted for making other lawful use of a CD, e-book, or digitized image; and
- Provisions making certain that what is *theoretically permitted* also will be *practically possible*, by ensuring that end-users can get the tools they need to engage in permitted practices. By incorporating the Supreme Court’s time-tested *Sony “Betamax”* standard, this part of the bill gives courts the tools they need to make sure that vendors of true black boxes—i.e. devices with limited purposes other than to enable wrongful circumvention—cannot avoid the full weight of the law.

Importantly, H.R. 107 would do nothing to diminish copyright owners’ ability to prosecute infringers for copyright infringement. The content industries may assert that without sweeping, general anti-circumvention legislation they cannot protect their rights in the Internet environment. The record suggests otherwise—as, for example, the recording industries’ current enforcement campaign against individual participants in P2P networks demonstrates the continued vitality of traditional copyright enforcement. In fact, the same digital technologies that enable unauthorized trafficking in copies of protected works also facilitate the tracking of the individuals who engage in such trafficking. H.R. 107 would give copyright owners still more tools to use in pursuing and punishing bad actors, without burdening the rest of the American public. If there are, and there well may be, specific contexts in which still more protections are required to assure the security of particular kinds of content, these situations can be dealt with through specific legislative and regulatory provisions. Such a targeted approach to enhanced anti-circumvention protec-

tion has the virtue of addressing problem areas in which there are real, demonstrated needs while leaving consumers and competitors generally free to engage in otherwise lawful practices.

CONCLUSION: THE INTERNATIONAL PERSPECTIVE

In closing I would note that not only *should* Congress seize the opportunity presented by H.R. 107 to restore the historic balance founded on freedom and fairness that the DMCA has disturbed, but that it clearly possesses the *authority* to do so consistent with the international obligations of the United States. The only multilateral agreements dealing with the issue of anti-circumvention are the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaties of 1996. Clearly, those treaties do not require the rigid and inflexible approach adopted in Sec. 1201 of the DMCA. Indeed, these relevant provisions of the treaties directly contemplate exceptions to national anti-circumvention legislation for uses that are the subject of exceptions and limitations to copyright itself. As the foremost experts on the treaties have put it, they "contain[] no obligation to protect technological measures in areas where... limitations or exceptions to the rights exist under domestic law and thus have 'permitted by law' the use of the protected works." [Jorge Reinbothe and Silke von Lewinski, *The WIPO Treaties—1996* 146 (2002).]

In fact, when the legislation that became the DMCA was pending, Mr. Boucher put this question to the Commissioner of the Patent and Trademark Office, the lead official for the Administration in negotiating the treaties and then selling the implementing legislation to Congress:

Mr. BOUCHER. "Within the confines of the treaty and its legal requirements, assuming that we ratify it, could we meet those requirements by adopting a conduct oriented approach as opposed to a device oriented approach?"

Mr. LEHMAN. In my personal view—it has not been cleared through the whole Administration, the Department of Justice and so forth—in my personal view, the answer is yes....

[H.R. 2281, *WIPO Copyright Treaties Implementation Act and H.R. 2180, Online Copyright Liability Limitation Act*, Hearing before the Subcommittee on Courts and Intellectual Property, 105th Cong., 2d Sess. 62 (1997).]

As the same experts I quoted previously have candidly acknowledged, it is not clear how the treaties foresee prohibitions against the manufacture and distribution of circumvention technologies being adapted to accommodate limitations and exceptions under domestic law. On this issue, the solution offered by H.R. 107—that of transposing the *Sony* standard into the context of anti-circumvention legislation—represents a creative approach that, in my opinion, is fully defensible within the scheme of existing international law.

In sum, H.R. 107 deserves enthusiastic and general support. We urge you to work with your colleagues to enact this vitally important bipartisan legislation into law.

Thank you for this opportunity to share my views, and those of the Digital Future Coalition, with the Subcommittee.

Ms. BONO. Thank you very much. I understand we have a former counsel who has worked with us quite a bit. Welcome back.

Ms. Rose, you have your 5 minutes, please.

STATEMENT OF DEBRA ROSE

Ms. ROSE. Thank you. Madam Chairman, I appreciate the opportunity to testify on behalf of the Entertainment Software Association regarding H.R. 107, the Digital Media Consumers' Rights Act. ESA strongly opposes H.R. 107 because it will substantially harm the entertainment software industry in two ways.

It eliminates the measures Congress put in place in the DMCA which video game publishers rely on to help protect their products against unauthorized use. Two, it will stifle the growth of the industry through unnecessary Government regulation of the labeling of media products instead of allowing private industry to inform consumers of the permissible uses of their products.

ESA members publish video and computer games including games for video game consoles, personal computers, handheld devices, and the Internet. ESA members produce more than 90 per-

cent of the \$7 billion in entertainment software sold in the United States in 2003. With worldwide video game revenue now exceeding \$25 billion the industry is one of the fastest growing of all entertainment sectors.

This industry has more than doubled in size since the mid-1990's generating thousands of highly skilled jobs in the creative and technology fields. Our industry makes a tremendous investment in its intellectual property. A typical video game now takes 2 or 3 years to create at a cost of \$5 to \$10 million and sometimes double that.

Unlike most other entertainment products, video games enjoy a very short commercial window in which to produce a return on these investments. As a result, only a small percentage of game titles actually achieve profitability. In this market environment it is easy to understand how devastating piracy and added Government regulation would be to this industry siphoning revenue required to sustain the enormously high cost necessary to continue producing video games.

The digital environment allows users of electronic media to copy, send, and retrieve perfect reproductions of copyrighted material easily and nearly instantaneously to or from locations around the world. In response Congress ought to make digital networks safe places to disseminate copyrighted works for the benefit of consumers and copyright owners.

In 1998 Congress enacted the DMCA which prohibits the circumvention of technological measures that effectively control access to copyrighted work and the manufacturer's sale of devices that permits such circumvention. The protections afforded by the DMCA are essential to the vitality and continued growth of the entertainment software industry.

Game products are produced and exist only in digital format and are used exclusively on electronic media devices. Given the existing levels of hard goods and Internet piracy game publishers use an array of technological protection measures to regulate unauthorized access and use of the game content.

H.R. 107 eliminates the protections of the DMCA and opens the floodgates for massive piracy of video games and other copyrighted works. H.R. 107 would permit the circumvention of access controls if it does not result in infringement and the manufacture and sale of circumvention devices that are capable of enabling significant noninfringing use of a copyrighted work.

This seemingly innocuous proposal undermines the protections of the DMCA and renders it meaningless. H.R. 107 legalizes trafficking and hacking tools. The stark reality is that no technology exists to ensure that circumvention is only done for legitimate non-infringing uses. Any technology or device capable of enabling significant noninfringing use is also capable of permitting rampant piracy.

Once the technological protection measure protecting a video game is circumvented, that game is unprotected or in the clear. The single copy envisioned by the proponents of H.R. 107 will quickly become thousands of equally high quality copies distributed instantly around the world. H.R. 107 would legalize circumvention

devices and allow pirate game product to grow beyond the already billions of dollars worth available in worldwide markets today.

H.R. 107 will undo the carefully balanced resolution which Congress under the guidance of this committee enacted in the DMCA to address the issue of fair use. Congress considered and rejected this same proposal several times during the debate on the DMCA. Instead Congress balanced the new protections by creating a triennial rulemaking process conducted by the Librarian of Congress to evaluate the impact of circumvention prohibitions on consumers' ability to make noninfringing uses of copyrighted works and to issue exemptions as necessary.

Since the enactment of the DMCA the Librarian has conducted two rulemakings and in both did not find any evidence to warrant a blanket exemption from the DMCA for circumvention devices that allow consumers to make noninfringing uses.

Let me be clear. This well-designed rulemaking enacted by Congress is working. Consumer interests are protected. H.R. 107 would render it useless to video game publishers because trafficking in circumvention devices to commit video game piracy would be legal and the entertainment software industry would enter a very, very dark age.

H.R. 107 also includes an onerous labeling requirement for music CDs. While it does not seek to regulate labeling of video games, it does set an unwise precedent which could lead to burdening this industry with new regulatory requirements that do not provide added benefit to our consumers.

The entertainment software industry has a strong and proactive track record of voluntarily providing information about our products and the permissible uses to its customers. Our industry's consumers know and understand the nature of our games and the devices on which they are played. Private industry is in the best position to determine legitimate consumer expectations, not the Federal Government.

In conclusion, ESA urges this subcommittee to reject the proposals in H.R. 107 once and for all. Both the video game industry and its consumers have benefited from the DMCA because more digital entertainment products are being made available to the public in user-friendly formats.

If H.R. 107 were to be enacted, everyone loses. Thank you.
[The prepared statement of Debra Rose follows:]

PREPARED STATEMENT OF DEBRA ROSE, SENIOR LEGISLATIVE COUNSEL, THE ENTERTAINMENT SOFTWARE ASSOCIATION

Thank you Mr. Chairman for the opportunity to discuss H.R. 107, the "Digital Media Consumers' Rights Act." I appear on behalf of the Entertainment Software Association (ESA). I joined ESA in January of this year, after serving as counsel on the House Judiciary Committee, Subcommittee on Courts, the Internet, and Intellectual Property for the past seven years. It is an honor to testify before you, Chairman Stearns, Ranking Member Schakowsky, and Members of the Subcommittee, on these important issues.

ESA strongly opposes H.R. 107 because it will substantially harm the entertainment software industry in two ways: 1) it eliminates the protections created by Congress in the "Digital Millennium Copyright Act (DMCA)" for technological measures which video game publishers use to protect their products against unauthorized use; and 2) it will stifle the growth of the digital marketplace through unnecessary government regulation of the labeling of media products instead of allowing private industry to inform consumers of the permissible uses of their products.

The ESA serves the business and public affairs interests of companies that publish video and computer games, including games for video game consoles, personal computers, handheld devices, and the Internet. ESA members produced more than 90 percent of the \$7 billion in entertainment software sold in the United States in 2003. In addition, ESA's member companies generated billions more in exports of American-made entertainment software, helping to power the \$20 billion global game software market. The entertainment software industry is one of the nation's fastest growing economic sectors, more than doubling in size since the mid-1990's and in so doing, has generated thousands of highly skilled jobs in the creative and technology fields.

Our industry makes a tremendous investment in its intellectual property. For an ESA member company to bring a top game to market, it often requires a team of 20 to 30 professionals—sometimes twice that number—working for two to three years to fuse together the work of writers, animators, musicians, sound engineers, software engineers, and programmers into an end-product which, unlike other entertainment products, is interactive. On top of these research and development costs, publishers will invest at least \$5 to \$10 million to market and distribute the game. The reality of the marketplace is that games enjoy a very short commercial window in which to produce a return on these investments as the vast majority of a game's sale occurs within the first two months after the game is released. As a result, only a small percentage of game titles actually achieve profitability, and many more never recover their front-end R&D costs. In this market environment, it is easy to understand how devastating piracy and added government regulation can be, siphoning revenue required to sustain the enormously high creative costs necessary to produce commercially profitable video games. It is also the reason why technological protection measures play such a vital role in game publishers' efforts to protect their products' commercial viability.

I. THE DMCA

The digital environment allows users of electronic media to copy, send, and retrieve perfect reproductions of copyrighted material easily and nearly instantaneously, to or from locations around the world. In response, the DMCA sought to make digital networks safe places to disseminate copyrighted works for the benefit of consumers and copyright owners.

The DMCA was the foundation of an effort by Congress to implement United States treaty obligations and to move the nation's copyright law into the digital age. The DMCA implements two 1996 World Intellectual Property Organization (WIPO) treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

Specifically, the treaties require legal prohibitions against circumvention of technological protection measures employed by copyright owners to protect their works. Congress determined that current law did not adequately protect digital works and that to promote electronic commerce and the distribution of digital works, it was necessary to provide copyright owners with legal tools to prevent widespread piracy. As a result, Title I of the DMCA implements the treaty obligations by creating a new prohibition in the Copyright Act on circumvention of technological protection measures.

Title I of the DMCA added a new chapter 12 to the Copyright Act. Section 1201 divides technological measures into two categories: measures that prevent unauthorized access to a copyrighted work and measures that prevent unauthorized copying of a copyrighted work. 1201(a) prohibits the act of circumventing access controls and the manufacture or sale of devices that permit such circumvention. 1201(b) prohibits the manufacture or sale of devices that circumvent copy controls.

Congress balanced these new protections by ensuring consumers would continue to have the ability to make certain legitimate uses of copyrighted works in the digital environment. Congress created a tri-annual rule-making process conducted by the Librarian of Congress to evaluate the impact of the circumvention prohibitions on consumers' ability to make fair use of copyrighted works and to issue exemptions as necessary. Since the enactment of the DMCA, two such rule-makings have been successfully conducted by the Librarian.

The protections afforded by the DMCA are essential to the vitality and continued growth of the entertainment software industry. Game products are produced and exist only in digital format and are used exclusively on electronic media devices. Given the rampant hard goods and Internet piracy—with piracy levels that reach as high as 80% and 95% in some markets—game publishers must utilize technological measures to have a chance at recouping the tremendous investment that is required today to bring a successful game to market.

The entertainment software industry uses an array of technological protection measures (TPMs) on its various products, including those for personal computer, console, and handheld games. For example, video game consoles have built-in access controls designed to prevent the playing of counterfeit versions of the games. These self-help protection methods act as “digital locks,” that regulate unauthorized access to the game content.

Video game consumers consistently report a high level of satisfaction with their purchase and use of game products. In other words, the use of TPM’s has not interfered with the entertainment software industry’s ability to meet consumer expectations with regard to access, play, portability, and ability to make full use of a game title.

The DMCA ensures that game publishers have legal recourse against those who circumvent protection measures or manufacture and distribute products that enable circumvention. Without this protection, development and digital distribution of new products becomes an exceedingly risky proposition because publishers place at considerable risk the tens of millions of dollars spent in developing and marketing game products. On the other hand, as has been shown during in the two 1201 rulemakings, both copyright owners and consumers have benefited from the DMCA because more digital entertainment products are being made available to the public in user-friendly formats.

II. H.R. 107 ELIMINATES DMCA PROTECTIONS AND LEGALIZES CIRCUMVENTION DEVICES

Under the misleading title of “Fair Use Amendments,” section 5 of H.R. 107 eliminates the protections of the DMCA and opens the flood gates for massive piracy of copyrighted works.

H.R. 107 Legalizes Trafficking in “Hacking” Tools

Section 5(b)(1) amends Title 17 to state that it is not a violation of law to circumvent a technological measure that controls access to a copyrighted work, if the circumvention does not result in an infringement of the work. Section 5(b)(2) further states that it is not a violation of law to manufacture, distribute, or make non-infringing use of a hardware or software product capable of enabling significant non-infringing use of a work.

While these proposals are described as reasonable and necessary by the supporters of H.R. 107, the stark reality is that no technology exists to ensure that circumvention is only done for legitimate fair use purposes. Any technology or device capable of “enabling significant non-infringing use” is also capable of permitting rampant piracy. In fact, at a recent Digital Rights Management Conference, Professor and leading DMCA-critic Edward Felten acknowledged, “The answer, I think, right now, is that we don’t know how to do that. Not effectively,” in response to the question of whether it was possible to develop technologies that would allow circumvention for fair uses without opening up the Pandora’s box and essentially repealing the anti-circumvention laws.

In addition, once a TPM is circumvented, the game is unprotected or in the clear. The resulting copy is a perfect copy that can be available for any purpose, not just fair use. In the digital world of today, the “single copy” envisioned by supporters of H.R. 107 will quickly become hundreds, or thousands, of equally high-quality copies distributed instantly around the world. As ESA’s President, Doug Lowenstein, recently testified in a Senate Subcommittee hearing on international and domestic enforcement of intellectual property laws, “Billions of dollars worth of pirated entertainment software products are present in worldwide markets today.” Today, there are illegal devices such as “mod chips” and “game copiers” which circumvent access controls and allow for play of counterfeit games. H.R. 107 would legalize these devices and pave the way for uncontrollable and massive piracy.

The use of TPMs reflects a technological attempt by rights holders to prevent the illegal use and copying of their products. When they are not hacked and work effectively, TPMs save the games industry millions of dollars per year in losses to piracy. Game companies spend substantial sums for the use of TPMs in protecting their games. Some game companies have gone even further and have developed their own proprietary TPMs to protect their product. All of the industry expenditures on preventative measures not only protect industry from the financial damages caused by piracy but also save taxpayers and law enforcement millions of dollars by protecting such legitimate commerce from criminal activity and also benefit consumers by encouraging widespread dissemination of copyrighted materials through legitimate channels.

The DMCA anti-circumvention provisions were enacted to help incentivize such private sector expenditures on and investment in preventative measures by providing remedies against devices that undermine such measures. H.R. 107 would viti-

ate such incentives and thereby foster a greater reliance on law enforcement and government resources to address the resulting increase in the volume of illegal products. Courts and law enforcement would be additionally burdened while commerce in legitimate products would be reduced in the face of competition with illegal counterparts, resulting in additional losses to taxpayers.

H.R. 107 Undoes what Congress Accomplished in 1998

H.R. 107 will undo the carefully balanced resolution which Congress enacted in the DMCA to address the issue of “fair use.” Because it is impossible to limit the use of circumvention devices to only “fair uses,” Congress rejected this same proposal, several times in fact, when considering the DMCA in 1998. Representative Boucher advocated the so-called “fair use” exemption in both the Commerce and Judiciary Committees and both Committees rejected it. Instead, to ensure consumers the continued ability to make fair use of copyrighted works in the digital environment, Congress, under the leadership of the Commerce Committee, created a “failsafe” procedure.

Every three years, the Librarian of Congress, in conjunction with the Copyright Office and the Commerce Department, initiates a review of whether public access to copyrighted materials is being harmed or threatened as a result of the circumvention prohibition in the DMCA. If, after holding hearings and reviewing testimony, there is evidence to support the claim that users are not able to make non-infringing use of a class of works, the Librarian may exempt persons who engage in non-infringing uses of works in that class from the prohibition against circumvention of access controls.

Since the enactment of the DMCA, the Librarian has conducted two rulemakings and issued significant exemptions. In both rulemakings, and particularly the most recent which was completed just last year, the Librarian considered and rejected the broad proposals contained in section 5 of H.R. 107. The Librarian did not find any evidence to warrant a blanket exemption from the DMCA for circumvention devices that allow consumers to make noninfringing uses.

To get directly to the point, the well-designed rulemaking enacted by Congress in 1998 is working. H.R. 107 would render it useless because all circumvention devices would be legal. Trafficking in of such circumvention devices to commit video game piracy would essentially be legal and the entertainment software industry would enter a very, very dark age.

III. H.R. 107 CREATES UNNECESSARY GOVERNMENT REGULATION OVER THE LABELING OF MEDIA PRODUCTS, STIFLING DIGITAL MARKET PLACE

H.R. 107 would require every copy-protected music CD to include in its labeling a notice prescribed by the Federal Trade Commission (FTC) informing consumers of the restrictions on the CD’s playability and recordability. While H.R. 107 currently pertains only to music CDs, legislation in the Senate would apply similar onerous labeling requirements on all digital content.

The entertainment software industry has a strong and proactive track record in voluntarily providing information about our products to customers. Consumers of video games have known and accepted for years that video game hardware systems and computer and video game software are copy-protected in various ways. For example, there is no legitimate expectation on the part of consumers to copy a PlayStation game for use on a GameCube or an Xbox, or to copy a PC game for use on a dedicated game console. Our industry’s consumers know that the games they purchase are embedded with certain technological restrictions.

Under the bill, the FTC would be given sweeping new regulatory powers to promulgate new labeling requirements on an annual basis. A rulemaking by an agency unfamiliar with multiple emerging digital protective technologies and consumer expectations is unwise and likely to lead to misguided regulation—consumer expectations can vary tremendously by product type—expectations about music and other copyrighted products are often very different than those concerning video games. Indeed, in its 2001 report to Congress, the U.S. Copyright Office said, “In any event, these issues of consumer expectations and the growth of electronic commerce are precisely what should be left to the marketplace to determine.”

We oppose mandated labeling proposals because we believe they are unnecessary, they impose government into private sector business licensing practices, and they assume that the federal government is better able to determine “legitimate consumer expectations” than the free market.

The marketplace, not Congress or the FTC, is where legitimate consumer expectations over product use or access should be mediated. The computer and video game industry is a perfect example of this marketplace success—an industry whose products have always included protection from unauthorized copying and distribution,

whose consumers have accepted and understood these use and access restrictions, and whose relationship with these consumers has made us the fastest growing segment of the entertainment industry. Our industry's consumers know our products and their uses because of the unique nature of our games and the devices on which they are played. Burdening this industry with new regulatory requirements would provide no added benefit for our consumers, and is a classic example of trying to "fix something that isn't broken."

Ms. BONO. Thank you very much. I understand the next two panelists are going to share your testimony.

Mr. Murray and Ms. Sohn, you have 5 minutes to share amongst you.

STATEMENT OF GIGI SOHN

Ms. SOHN. My name is Gigi Sohn and I am President of Public Knowledge. Thank you, Madam Chairwoman, and other distinguished members of the subcommittee. Chris Murray, Legislative Counsel for Consumers Union, joins me. We are presenting this testimony on behalf of our organizations and the Consumer Federation of America. We want to thank the subcommittee for giving us this opportunity to give a consumer perspective on H.R. 107.

We strongly support H.R. 107 because it is a narrowly tailored bill that corrects some of the major imbalances in our copyright law that were unintentionally created by the DMCA. These balances have done great damage to long recognized rights of consumers to make lawful uses of copyrighted content.

I just have to add that I think it is kind of sad to hear the recording industry and the motion picture industry refer to consumers, their customers, as criminals. Digital technology allows content to be more easily available, mobile, and transferrable to a range of innovative devices. It is ironic then that a law that was intended to move consumers into an age of technological abundance has actually taken technology out of their hands.

H.R. 107 protects consumers in two ways. First, it requires labeling on copy-protected compact disks so that consumers can make informed choices about the digital media they buy. The market place works best when consumers have more information, not less.

Second, H.R. 107 clarifies and reinstates the original intention of Congress that the anti-circumvention provisions of the DMCA not override the consumer's right to make lawful uses of digital content. There has been a lot of focus today about making backup DVD copies. What about being able to play the digital media that you buy on your device of choice or the ability to fast-forward through advertisements? That has nothing to do with piracy.

It was the Commerce Committee that was the most concerned about the effect this prohibition would have on consumer's rights and technological innovation. Two sections of the DMCA were intended to protect consumer rights. Section 1201(c), which preserves the fair use protections of the Copyright Act and Section 1201(a)(1) which requires the Copyright Office to conduct a proceeding to determine whether exemptions from the anti-circumvention provisions are necessary.

As Chris will discuss, these protections have been a failure in practice. The inability to distinguish between a copy control and access control has rendered the fair use protection virtually worthless and the Copyright Office has interpreted the burden of proof for an

exemption so narrowly that only four exemptions have been granted in 6 years. This fail-safe mechanism has failed.

You have heard dire predictions today that should H.R. 107 pass, the content industry would suffer irreparable damage. You will hear them again I assure you just as you heard dire predictions about audio tapes and the VCR. But history suggests that our copyright system is not quite so fragile as the doomsayers would have you believe. All H.R. 107 would do is restore the balance to the DMCA that Congress originally intended and thereby also restore the balance that has been part of our copyright system for over two centuries. Thank you again.

STATEMENT OF CHRIS MURRAY

Mr. MURRAY. Madam Chairman, thank you for having me before your committee again. I am here to represent Consumer Reports, or rather Consumers' Union, the nonprofit publisher of Consumer Reports magazine. We operate the largest paid subscriber base on the Internet ahead of the Wall Street Journal last February which I am excited about.

We make a living based on copyright on protection of our content. I couldn't be here before you today but for the protection that copyright affords. What I would like to do, though, is wrestle us just briefly out of the discussion about backup copies and media and talk a little bit about what has been referenced a few times, garage door openers and printer cartridges and auto parts aftermarkets. What do these things have to do with copyright?

The answer is that in every instance we have seen the Digital Millennium Copyright Act used anti-competitively to stifle innovation in each of those contacts where entrepreneurs who are building better mousetraps are not able to bring those products to market, or rather once they bring them to market, they face fairly severe litigation that forced them to either withdraw projects or have the effect of chilling investment in these new products.

I would submit that the question today is not whether or not the anti-circumvention provisions of the DMCA are broken, but rather what is the appropriate fix. I would urge the committee to consider H.R. 107 as an appropriate fix.

I will touch briefly on labeling. I assume my time is extremely short? 60 seconds? Okay. To touch briefly on labeling, increasingly companies are putting products in the market place that don't have the full functionalities that consumers expect and it is completely within the rights of companies to do that.

The question is in an age where we know that also increasingly 46 percent of households are using their computers to play music and DVDs according to 2003 Forrester Research Survey. What should be the expectations of those consumers about the information that they get about what is on their products. I submit that a voluntary labeling scheme simply will not do when it runs rather counter to the incentives of companies of companies to provide the full range of disclosures that consumers need.

The final thing that this bill does which I strongly encourage this committee to adopt is that it enshrines the sensible pro-innovation, pro-entrepreneur balance that is the Sony Betamax division into law. We should remember that this is a case that the American

Motion Picture Association said it was happy to lose because, as a result, the VCR was permitted to exist in full. It is, I believe, about 40 percent of the revenue base currently. It is one of the most lucrative slices of their copyright pie.

The Betamax decision didn't strangle the industry as we were told that it would. Instead, it has been one of the greatest success stories in our economy and it has allowed the consumer electronics industry of the last 20 years to be the strong engine of economic growth that it has been.

I assume that my time is up but, in closing, I will just urge the committee to please consider Representative Boucher's excellent bill.

[The prepared statement of Gigi B. Sohn and Chris Murray follows:]

PREPARED STATEMENT OF GIGI B. SOHN, PRESIDENT, PUBLIC KNOWLEDGE AND CHRIS MURRAY, LEGISLATIVE COUNSEL, CONSUMERS UNION, CONSUMER FEDERATION OF AMERICA

Chairman Stearns, ranking member Schakowsky, and distinguished members of the subcommittee, this testimony is being submitted on behalf of Public Knowledge, Consumers Union, and the Consumer Federation of America. We want to thank the subcommittee for giving us this opportunity to give a consumer perspective on the Digital Media Consumers' Rights Act of 2003 (H.R. 107). We thank Rep. Boucher and Rep. Doolittle for introducing H.R. 107 and Chairman Barton for co-sponsoring the bill. We strongly support H.R. 107 because we believe it is a narrowly tailored bill that corrects some of the major imbalances in our copyright law that were unintentionally created by the Digital Millennium Copyright Act of 1998 (DMCA).

The digital transition represents an extraordinary technological advance for consumers. Improved audio and video quality through digital broadcasts and recording, combined with new integration of consumer electronics devices mean that consumers will be able to experience news, information and entertainment in ways as never before. In this new digital society, content is mobile and easily transferable to a whole range of devices, especially those within one's own personal network. We are moving toward a world of seamless interoperable systems where our content—our movies, music, documents, photographs—can be called up at anytime, anywhere.

The American consumer is driving the digital transition. But protection of consumers' rights is essential to this transition both as a matter of principle and as a matter of encouraging a market climate that supports technological innovation and economic vibrancy. H.R. 107 provides an opportunity to make needed changes to the DMCA in ways that preserve the rights of consumers.

INTRODUCTION

When Congress was considering the DMCA during the 105th Congress, many nonprofit, consumer, and industry groups, including some of the groups that are testifying today, testified before this committee in opposition to the Act. At that time, these groups said that no drastic changes to our copyright framework were necessary to protect the rights of copyright holders. They further argued that new legislation such as the DMCA could limit a citizen's access to information and stifle legal uses of content. In addition, they argued that the DMCA would constrain creativity and the ability to innovate and, worse, would put a price tag on non-infringing legal uses of digital content.

The Commerce Committee and the Congress heard these arguments, and attempted to preserve some of the core principles underlying copyright law in the plain text of the DMCA. First, Congress sought to protect fair use in 17 U.S.C. § 1201(c), stating that nothing in the DMCA "shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title." Second, and critically, in 17 U.S.C. § 1201(a)(1)(C), Congress provided for the copyright office to conduct a "triennial review" to ensure that people seeking to make non-infringing uses of copyrighted works were not prohibited from doing so by the restrictions on circumvention of so-called "access controls" placed on digital copyrighted works.

Almost six years later and contrary to the express intent of Congress, these protections have been virtually ignored. The DMCA has gone from being a law that was

intended to protect digital copyright material against unlawful infringement to one that chills free speech, stifles research and innovation, harms competition in markets having nothing to do with copyright, places undue burdens on law abiding consumers, and protects particular business models at the expense of fair use and other lawful uses of copyrighted works.

There are several reasons why the DMCA has morphed into a law that almost categorically prohibits fair use. First, the line between what is a “copy control,” which can be circumvented under the DMCA, and what is an “access control,” which cannot, has been blurred to the point of meaninglessness. Is the Content Scrambling System (CSS) on a DVD an access control or a copy control? How about the FCC’s newly adopted broadcast flag?

Second, the U.S. Copyright Office has defied the express will of Congress that the triennial review process be a “fail-safe mechanism”¹ that would “ensure that access [to digital copyrighted materials] for lawful purposes is not unjustifiably diminished.”² In the six years since the DMCA was passed, the Copyright Office has conducted two triennial reviews, consisting of hundreds of exemption requests and thousands of pages of written submissions and oral testimony, and has granted only four, extremely narrow exemptions. The small number and minuscule scope of the exemptions can be attributed largely to the Copyright Office-created burden of proof, which has no basis in the plain language of the DMCA. Indeed, the Assistant Secretary of Commerce for Communications and Information, who is tasked with assisting the Register with the rulemaking, has both times raised concerns with the Copyright Office’s excessively narrow interpretation of the statute.

Fortunately, many of these problems can be corrected by the narrowly tailored legislation that is the subject of today’s hearing. H.R. 107, the Digital Media Consumer Right Act (DMCRA), can play a central role in this refinement of the DMCA by ensuring that fair use principles apply to Section 1201 of the Copyright Act. Moreover, the bill would ensure that consumers will have the information they need when deciding whether to purchase copy protected compact discs.

I. H.R. 107 IS A NARROWLY TAILORED BILL THAT REINSTATES AND CLARIFIES THE INTENT OF CONGRESS TO PRESERVE FAIR USE IN THE DIGITAL MILLENIUM COPYRIGHT ACT.

As discussed below the DMCA, as currently applied and interpreted is having a detrimental effect on free speech, consumers’ rights, fair use, and innovation. Moreover, the Copyright Office’s triennial rulemaking process, has not functioned as the safeguard it was intended to be. Fortunately, Congress now has a bill before it that addresses these issues—H.R. 107—“The Digital Media Consumer’s Rights Act of 2003” (DMCRA).

First, the DMCRA’s labeling provision will ensure that consumers are fully aware of the limitations and restrictions they may encounter when purchasing copy-protected compact discs (CDs). Currently, manufacturers of copy-protected CDs are not obligated to place notices on packaging. Unbeknownst to many consumers, copy-protected CDs may not play on personal computers and other non-compatible CD players due to copy protection technologies. The DMCRA does not prohibit the sale of copy-protected CDs; instead it requires that the Federal Trade Commission provide guidelines so that these CDs have adequate labels notifying purchasers of possible limitations of their use of purchased digital media. This approach will enable consumers to make informed purchasing decisions and eliminate the confusion created by seemingly “defective” CDs that do not play on all devices.

Labeling will become increasingly important as copy-protected CDs and other digital media become more common as a means to prohibit and limit unwanted use and unauthorized distribution of music, movies, and other digital content. The DMCRA ensures that new CD formats do not enter the marketplace without providing consumers notice of their limitations. The market may or may not accept CDs with more limited functionality, but it is imperative that consumers receive complete and accurate information regarding the CDs they may purchase. No consumer should purchase a CD only to be surprised that it does not play on his or her computer or CD player. The DMCRA will create an informed marketplace where competition among new CD formats can prosper without consumer confusion.

Even more important than the Act’s labeling requirement is the DMCRA’s fair use exemption, which will ensure that legal, non-infringing uses of digital copyrighted works are not prohibited by the DMCA. Furthermore, the DMCRA encourages sci-

¹ Report of the House Committee on Commerce on the Digital Millennium Copyright Act of 1998, H.R. Rep. No. 105-551, at 36 (1998) [hereinafter Report of House Comm. on Commerce].

² Id.

entific research into technological protections. It ensures that activities solely for the purpose of research into technological protection measures are permitted.

This committee will inevitably be told that to permit a fair use exemption to Section 1201(a) is to undermine the effectiveness of the entire DMCA. This is simply not true. One of this bill's virtues is that it does not weaken the effectiveness of technological controls. Instead, it ensures that the controls function solely as intended—to stop illegal activity and infringement. Infringers will still face the same penalties, but the DMCRA enables people who have legally obtained access to digital content to exercise legal uses without fear of criminal punishment.

II. CONGRESS INTENDED TO PRESERVE FAIR USE WHEN IT PASSED THE DMCA.

As this Subcommittee knows, information is a building block of democracy, which is why the public's ability to access information was built into our Constitution. Specifically, as a means of encouraging innovation and the widespread dissemination of information, the Constitution allows Congress to grant a limited monopoly to a creator. Nevertheless, this power granted to Congress is aimed primarily at benefiting the general public; “[t]he copyright law, like the patent statutes, makes reward to the owner a secondary consideration.”³ Congress, of course, was well aware of this when drafting the Digital Millennium Copyright Act (DMCA), and it is also clear that the DMCA's drafters intended to protect fair use

As noted above, Congress heard from a number of interested parties, including the consumer electronics industry, libraries, and consumer advocates, about the DMCA's potential effect on the doctrine of fair use. When the final report was written, the Commerce Committee expressed a deep understanding of fair use's impact on education, research, and free speech:

The principle of fair use involves a balancing process, whereby the exclusive interests of copyright owners are balanced against the competing needs of users of information... Fair use, thus, provides the basis for many of the most important day-to-day activities in libraries, as well as in scholarship and education.

It also is critical to advancing the personal interests of consumers.⁴

The Commerce Committee also recognized the role fair use would play with respect to digital commerce:

[Fair use] is no less vital to American industries, which lead the world in technological innovation. As more and more industries migrate to electronic commerce, fair use becomes critical to promoting a robust electronic marketplace.⁵

Thus, the Committee was keenly aware that access to information is the centerpiece of a well-functioning marketplace, and expressed concern that the DMCA's potential to create a legal framework for the lock-down of information in a “pay-per-use society” could contravene that goal.⁶ To alleviate this concern, Congress placed two express directives in the DMCA: that nothing in the law “shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title;”⁷ and it established a triennial rulemaking procedure requiring the Copyright Office to examine the DMCA's adverse effects on the lawful use of digital copyrighted works.

III. CONTRARY TO THE EXPRESS INTENT OF CONGRESS, THE DMCA IS BEING USED TO PROHIBIT THE EXERCISE OF MANY FAIR USES OF DIGITAL CONTENT.

Although the DMCA was designed to protect digital content from acts of copyright infringement, it has also had a negative impact on legitimate and legal uses of content, in spite of Congress's efforts to build balance into the Act. Digital content should provide more flexible consumer use, but the rise of overly restrictive content protection measures, coupled with the unintended consequences of the DMCA, has lead to the erosion of rights and personal uses consumers have come to expect with digital media. Consumers Union foresaw this outcome in its testimony in 1998 when it warned:

It would be ironic if the great popularization of access to information, which is the promise of the electronic age, will be short-changed by legislation that pur-

³ *Sony Corporation v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)

⁴ Report of House Comm. on Commerce at 25.

⁵ *Id.* at 26.

⁶ *Id.* “...The Committee on Commerce felt compelled to address these risks, including the risk that enactment of the bill could establish the legal framework that would inexorably create a ‘pay-per-use’ society.” *Id.*

⁷ 17 U.S.C. § 1201(c)(1).

ports to promote this promise, but in reality puts a monopoly stranglehold on information.⁸

Digital technology makes content more available and flexible for the public to use; the application and interpretation of the DMCA has effectively prohibited the exercise of many uses of digital content, however, including those lawful uses Congress intended to preserve. In our opinion, the primary reason for this is the complete lack of any real distinction in the DMCA between so-called “copy controls” and so-called “access controls.” Under the DMCA, a user of digital content can circumvent copy control mechanisms without penalty, but circumvention of an access control mechanism is illegal. But the reality is that there is no difference between the two mechanisms, and if you ask a content creator, he or she will inevitably claim that their technological protection measure is the more highly protected access control. In any event, even if a technological protection measure is technically a copy control mechanism, the Section 1201(a)(2) prohibition on the manufacture, importation and trafficking in devices that would allow such circumvention for all intents and purposes renders the ability to make fair uses of digital content unattainable to all but the most sophisticated users.

Below are some specific examples of how the incoherent distinction between copy controls and access controls, as well as other novel interpretations of the DMCA, have eroded and will continue to erode fair use protections:

A. The DVD

The DVD format has been a great success for both the content and consumer electronic industries.⁹ However, a consumer can do far less with this digital format as compared to analog formats, despite digital formats’ potentially greater flexibility. This is not because of a technical limitation of the DVD. The situation is attributable instead to controls placed on consumers by content providers, and the DMCA has been interpreted as prohibiting consumers from getting around the controls, even in pursuit of lawful uses of the underlying copyrighted work.

The content on a DVD is protected by CSS—the Content Scrambling System—that two federal courts have ruled is both an “access control” and a copy control under the DMCA.¹⁰ Moreover, only authorized DVD players are permitted legal access to a DVD’s content under the law. Thus, a consumer who gains access to her legally purchased DVD with her own software tools has violated the DMCA—even if the reason is for non-commercial purposes, including personal use or fair uses.

What this means is that if a consumer wants to make a backup of her favorite movie so she can watch it while traveling without fear that the disc will get scratched or lost, the consumer would be prohibited by the DMCA from doing so. If a student is creating a multimedia presentation and needs to digitally “cut and paste” from DVDs, she would be legally prohibited because of the DMCA.¹¹ Both backing-up and taking a digital excerpt from a DVD for the purposes of critique and comment are traditional fair uses, but are prohibited under the DMCA.¹²

Other non-infringing uses are being eroded as well:

- Many users are prevented from fast-forwarding through DVD advertisements;
- DVDs are region coded—so a DVD bought on a European vacation will not play when the consumer gets home;
- DVDs cannot legally be played at all on increasingly popular computer platforms.

Again, none of these is a technical limitation of the DVD. None is associated with infringement. Instead, they are controls placed on consumers by the content providers, and the DMCA arguably makes it illegal to get around the controls.

B. Tools that Enable Non-infringing Uses

The DMCA not only detrimentally affects the consumer who wants to make a fair use of digital content, but it also harms those entrepreneurial small businesses who capitalize on the market for software tools designed for noninfringing uses.

⁸*Id.*, citing Letter from Consumer’s Union to House Committee on Commerce (June 4, 1998).

⁹See *Video Games: Technology Titans Battle Over Format Of DVD Successor*, Wall St. J., at A1 (Mar. 15, 2004).

¹⁰*321 Studios v. MGM Studios, Inc., et. al.*, 307 F.Supp.2d 1085 (N.D. Cal. 2004); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2nd Cir.2001).

¹¹This also has implications on software tools, discussed below.

¹²The tools that give consumers the ability to circumvent a DVD’s access control measures have existed since shortly after the video format was created. Today, these tools are widely available on the Internet; many computer applications use the code to make fair uses of DVD content—none of which is likely legal under the DMCA. Despite this ability to “break” access controls and / or copy protection, the sales and profits of DVDs continue to increase yearly. This should signify to Congress that fair uses and content industry profits can live side-by-side.

In February of this year, a United States District Court enjoined 321 Studios from selling the most popular DVD back-up software because, the court found, it violates the DMCA.¹³ While the court acknowledged that the exercise of fair use is made difficult by the DMCA, if not outright impossible in regards to protected digital media, it stated that the legal use of purchased copyright materials was not a defense to 321 Studios violation of the DMCA.¹⁴

According to the decision in *321 Studios*,¹⁵ even if the act of making a backup copy is lawful, it is nevertheless illegal under the DMCA to provide a tool to conduct a legal act. This case illustrates how the DMCA, by outlawing the tools of fair use, limits the consumer's ability to make a fair use.¹⁶

C. Copy Protected CDs

Copy-protected CDs use technology designed to prevent the ripping or copying function of a personal computer in the hopes of preventing unauthorized file trading. However, when these CDs are inserted into certain modern CD drives, they often fail to play entirely.¹⁷ The purchaser of these products is left with a CD that is inaccessible and unplayable on one or more playback devices. In fact, an executive with one of the companies who produces copy protected CDs admitted that perfect protection and perfect playability can never be achieved.¹⁸

Copy-protected CDs already appear to be commonplace in many parts of Europe and Asia and the protection technology vendors have announced that their technologies have already been included in tens of millions of CDs.¹⁹ Although announcements of copy-protected titles have fallen off in the U.S., no major record label has renounced the use of protection technologies on music CDs in the U.S. market. It is safe to assume that additional titles will be released in the U.S. market and that the protection technologies used will result in malfunctions that deny access to consumers on at least some players that would otherwise have access to the audio tracks.

Because most consumers are as yet unaware that this technology even exists, we can only imagine the outrage that will ensue once most consumers discover that they are unable to create mix-discs from their favorite legally purchased albums, or that they are unable to transfer music from their CD to their iPod. Unfortunately the DMCA does not focus on the few bad actors who break copy-protected CDs to infringe copyright over peer-to-peer file trading networks. Instead, the law makes it illegal to provide the tools that permit consumers to playback CDs on their device of choice.

D. The Broadcast Flag

The broadcast-flag scheme is a content protection mechanism for digital broadcast television originally proposed by Hollywood and recently adopted by the Federal Communications Commission.²⁰ The broadcast-flag scheme currently does not prohibit all copying of over the air digital television, but it does promote technologies

¹³ *321 Studios v. MGM Studios, Inc., et. al.*, 307 F.Supp. 2d 1085 (N.D. Cal. 2004)

¹⁴ *Id.*

¹⁵ See also *Universal City Studios, Inc. v. Reimerdes*, 111 F.Supp.2d 346 (S.D.N.Y.2000); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2nd Cir.2001); *United States v. Elcom Ltd.*, 203 F.Supp.2d 1111 (N.D.Cal.2002).

¹⁶ The content industry's response to making backup copies of scratched or otherwise damaged disks—that the consumer must purchase a new one—is breathtakingly anticonsumer. “Jack Valentini, head of the Motion Picture Association of America, has suggested that consumers have no legitimate need for such software, telling The Associated Press in November, ‘If you buy a DVD you have a copy. If you want a backup copy you buy another one.’” DVD-copy program tweaked after court order, CNN.com, Feb. 23, 2004, available <http://www.cnn.com/2004/TECH/ptech/02/23/dvd.suit.ap/index.html>.

¹⁷ Bryan Chaffin, *Apple Addresses Problems With Copy-Protected CDs In AppleCare Support Article*, Macobserver (May 10, 2002) (describing instructions issued by Apple Computer to address copy-protected CDs that were not playable on Macintosh computers), at www.macobserver.com/article/2002/05/10.10.shtml; Chris Oakes, *Copy Protected CDs Taken Back*, Wired News, Feb. 3, 2000 (3 to 4 percent of German customers returned protected CDs introduced by BMG after they would not play in various CD players), at www.wired.com/news/technology/0,1282,33921,00.html.

¹⁸ See John Borland, *Labels Loosening Up on CD Copy Locks*, CNET News, Sept. 3, 2002, at <http://news.com.com/2100-1023-956069.html>.

¹⁹ See Midbar Tech Press Release, Aug. 26, 2002 (stating that over 30 million CDs protected by Cactus Data Shield have been distributed, including over 10 million in Japan), at <http://www.midbartechnology.com/pr/26082002.html>; Jon Iverson, *A Universal CD Problem?*, Stereophile, Feb. 11, 2002 (reporting that Sony has announced distribution of 11 million key2audio-protected CDs in Europe), at <http://www.stereophile.com/shownews.cgi?1261>.

²⁰ In the Matter of Digital Broadcast Content Protection, MB Docket 02-230, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 03-273, (Nov. 4, 2003).

that will inhibit current and future fair use. Technologies pending approval before the FCC restrict a range of non-infringing uses.²¹ Sidestepping these use restrictions, even when doing so is non-infringing, is illegal or practically impossible under the DMCA.²² This means that current uses of broadcast content with analog technology will likely be limited in the digital world under the broadcast flag reinforced by the DMCA.

E. Closing the “Analog Hole”

When faced with digital content that does not allow fair use, the courts and Copyright Office have asserted that access to analog content suffices as a viable alternative.²³ However, it is impractical and insufficient to hold out analog technology as the only method for making fair uses of digital content, particularly as the availability of analog formats continues to diminish.

For example, digital DVD is replacing analog VHS tape, and movie studios increasingly are refusing to provide their content in multiple formats. Additionally, there is an industry push to close the so-called “analog hole.” This is evidenced by the creation of an industry “Analog Reconversion Discussion Group” and industry requests for government-mandated “selectable output control,” which would allow copyright holders to embed signals in digital content that would prevent certain outputs, including analog outputs, from functioning normally.

For the consumer, this means that fair use will end with analog distribution formats. In an all-digital world, there will be no way to legally exercise fair use. Because the software and hardware tools for fair use will be prohibited, access to the content will be prohibited as well.²⁴

F. Aftermarket Products

The DMCA has also been abused by companies seeking to gain a market advantage with regard to products that have nothing to do with intellectual property or copyright infringement. As has been well documented, the strict language of the DMCA enabled a manufacturer of garage door openers and a printer manufacturer to make a claim against competitive interoperable replacement parts for their products.²⁵

IV. THE TRIENNIAL REVIEW IS AN INADEQUATE SAFEGUARD FOR NON-INFRINGING USES OF COPYRIGHTED WORKS.

Because Congress was concerned about the potential unintended consequences of the DMCA and its impact on non-infringing uses of digital content, it gave the Register of Copyrights and the Librarian of Congress the primary responsibility to assess whether the implementation of access control measures diminished the ability of individuals to use copyrighted works in ways that are otherwise lawful.²⁶ In re-

²¹ See e.g., In the Matter of Digital Output Protection Technology and Recording Method Certifications, Certification Applications, MB Dockets 04-60, 04-61, 04-62, 04-64 (Mar. 17, 2004).

²² Evidence of this can be found the affirmative response of Fritz Attaway of the MPAA, when asked if the broadcast flag was an effective technology measure under the DMCA:

AUDIENCE: Since the ATSC broadcast live descriptor is not encrypted, but just signals that this is to be projected content, is the first person who shows how to avoid the descriptor going to be guilty of a Digital Millennium Copyright Act violation for affording access to an effectively protected work?

FRITZ ATTAWAY: I certainly hope so. If that should happen, I would expect a DMCA lawsuit against that person and I would hope and indeed even expect that the courts would find that person guilty of violating the DMCA, because I think that the broadcast flag, now that it has been implemented in FCC regulations, is an effective technological measure. Standing alone, just that bit in the broadcast stream, without any underlying FCC requirement that devices respond to that flag, is not an effective measure. But now that the Commission has adopted the regulations, I think it is. I think the DMCA is applicable and we'll find out, no doubt, when this gets to the courts.” The Progress & Freedom Foundation, Copyright Protection and the Broadcast Flag, available at <http://www.pff.org/publications/ip/pop10.26broadcastflagseminar.pdf>.

²³ See Library of Congress, Copyright Office, Recommendation of the Register of Copyrights in RM 2002-4; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, at 116 (Oct. 27, 2003) [hereinafter Copyright Office Rec.], available at <http://www.copyright.gov/1201/docs/registers-recommendation.pdf>.

²⁴ Teachers, librarians, and others seeking to take excerpts from DVDs for fair use purposes have been told that the way to do so is to hold a camcorder up to a TV screen. See Copyright Office Rec., at 116. However, several pending state laws could make that act illegal as well. See State Legislative Status Report, Consumer Electronic Association, www.ce.org/members_only/public_policy/slsr/slsr_report.asp#HOME RECORDING RIGHTS.

²⁵ Chamberlain Group, Inc. v. Skylink Technologies, Inc., 292 F.Supp.2d 1040 (N.D.Ill., 2003); Lexmark Intern., Inc. v. Static Control Components, Inc., 253 F.Supp.2d 943 (E.D.Ky., 2003).

²⁶ Report of House Comm. on Commerce at 37.

sponse to some criticisms of the DMCA, it has been argued that the proper venue for remedying imbalances in, and the application of, the DMCA should be Copyright Office's triennial review rulemaking process. Unfortunately, in the two times it has been conducted since the DMCA was passed, this rulemaking proceeding has largely failed to protect noninfringing uses. Instead, just four narrow exemptions have been granted despite hundreds of legitimate requests and thousands of pages of written submissions and oral testimony.

The reason for this stinginess has been the Copyright Office's constricted interpretation of the standard one must meet to acquire an exemption. As discussed below, that interpretation is contrary to the plain language of Sections 1201(a)(1)(C) and 1201 (a)(1)(D) of the DMCA.

A. The Copyright Office's Burden of Proof for an Exemption Contravenes the Express Language of the DMCA.

When the Copyright Office established its rules for the triennial rulemaking, it developed a standard for the burden of proof that petitioners must meet to demonstrate their "diminished ability to use copyrighted works."²⁷ That standard clearly departs from the expressed intent of Congress. Any reasonable reading of the plain language of the DMCA shows that the burden of proof that the Copyright Office has set for obtaining an exemption is too high for the process to amount to an adequate safeguard of lawful uses.

The plain language of Section 1201(a)(1)(C) of the DMCA requires that when engaging in the triennial rulemaking, that the Librarian of Congress must determine:

- ... whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works. In conducting such rulemaking, the Librarian shall examine—
 - (i) the availability for use of copyrighted works;
 - (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;
 - (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;
 - (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and
 - (v) such other factors as the Librarian considers appropriate.²⁸

Despite this clear and detailed directive, the Copyright Office has required that proponents of an exemption show by a preponderance of the evidence that there has been or is likely to be a "substantial" adverse affect on a non-infringing use. Moreover, the proponent of an exemption must satisfy this burden with "actual instances of verifiable problems occurring in the marketplace," and "first hand knowledge of such problems."

This burden of proof is nowhere in the plain language of the Act. Indeed, the former Assistant Secretary of Commerce, which is mandated by Section 1201(a)(1)(C) to consult with the Register on the triennial rulemaking, protested to the Register that

...the standard set forth in the Notice of Inquiry (the "NOI") imposes a significantly heightened burden on proponents of an exemption, and is therefore inconsistent with the opportunity that Congress intended to afford the user community.

As a threshold matter, the plain language of the statute does not support incorporation of the qualifier "substantial" to define the level of harm to be demonstrated by such proponents... The term "substantial," however, does not appear in the text of Section 1201(a)(1) of the Act. The NOI's arguably more stringent requirement thus appears to add a significant new term to the express language of the statute. Given the clarity of Section 1201(a), no basis exists to justify insertion of a material modifier into its text.²⁹

While *de minimis* or isolated harms may not be enough to meet the burden of proof, there clearly is a zone between speculative statements of *de minimis* harms on the one hand and "actual instances of verifiable problems" by those with "first hand knowledge" on the other. But the Copyright Office recognizes no such zone.

²⁷ Report of House Comm. on Commerce at 37.

²⁸ 17 U.S.C. § 1201 (a)(1)(C).

²⁹ Letter from Nancy J. Victory, Assistant Secretary of Commerce to Ms. Marybeth Peters Register of Copyrights, (Aug. 11,2003), available at www.ntia.doc.gov/ntiahome/occ/dmca/dmca2003/dmcaletter_08112003.html (footnotes omitted).

Finally, the Copyright Office sets an unattainable standard for showing “future harms.” Proponents of an exemption must provide “evidence either that actual harm exists or that it is ‘likely’ to occur in the ensuing 3-year period,” by showing “actual instances of verifiable problems occurring in the marketplace” in order to “to satisfy the burden with respect to actual harm.” Moreover, “a compelling case will be based on first-hand knowledge of such problems.”³⁰ But common sense dictates that it is impossible for anyone to have “first-hand knowledge” of a future event. And nowhere in the statute does it indicate that Congress intended the standard for future harms should be higher than that for present harms.

The then-Assistant Secretary of Commerce expressed similar concerns to the Register of Copyrights:

[T]he NOI’s requirement to provide “actual,” “first-hand” instances of problems is not articulated in the plain language of Section 1201(a)(1) of the Act. Moreover, as drafted, this requirement cannot logically be applied prospectively, as the refinement would mandate “first-hand knowledge” of future problems in order to sustain a “compelling case” for an exemption. Given these concerns, NTIA believes that the NOI’s “refinement” should be abandoned and a standard more consistent with the statutory language should be adopted.

Crafting the proper standard for the burden of proof is equally important when examining possible future harms as contemplated by the statute. Section 1201(a)(1) of the DMCA does not ground a finding of “likely adverse impacts” in a showing of “extraordinary circumstances in which the evidence of likelihood is highly specific, strong and persuasive,” as the NOI seems to suggest. Rather, Congressional intent would appear to impose no more of a showing for “likely adverse effects” than for “actual adverse effects.” Although NTIA agrees that mere conjecture is insufficient to support a finding of “likely adverse effect,” the NOI’s implied supplemental and exacting requirements are contrary to the language of the statutory provision.³¹

We agree. The Copyright Office has created a burden of proof for the 1201(a)(1)(C) exemption that ensures, and will continue to ensure, that few, if any exemptions are ever granted, and that those that are granted are extremely narrow.

B. The Copyright Office Has Construed the Term “Class of Works” Too Narrowly

In the two triennial rulemakings since the DMCA was passed, numerous proponents for exemptions have asked the Copyright Office, when determining the “class of copyrighted” works to be exempted under Section 1201(a)(1)(D) to also consider the *types of uses* that are made with the copyrighted work. Indeed, such an examination is fully consistent with the plain language of that Section, which states in its entirety:

(D) The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period.³²

Despite this language, which explicitly refers to “noninfringing uses,” and the complete absence of any other Congressional intent that the types of uses of copyrighted works be absent from the exemption process, the Copyright Office has steadfastly refused to consider them, stating that “it is not permissible to classify a work by reference to the type of user or use....”³³ This narrow interpretation of Section 1201(a)(1)(D) makes little sense in light of the fact that the Copyright Office asks proponents of an exemption to make “first-hand” actual experience a top priority.

We believe that the approach that is more consistent with Congressional intent is that suggested by the former Assistant Secretary of Commerce in his September 29, 2000 letter commenting on the first triennial rulemaking—that “the definition of classes of works is not bounded by limitations imposed by Section 102(a) of the Copyright Act, but incorporates an examination of ‘noninfringing uses’ of the copyrighted materials.”³⁴

³⁰ Notice of Inquiry, Exemption to Prohibition on Circumvention on Copyright Systems for Access Control Technologies, Copyright Office, Library of Congress, 67 Fed. Reg. at 63579 (Oct. 15, 2002).

³¹ Letter from Nancy J. Victory, Assistant Secretary of Commerce to Ms. Marybeth Peters Register of Copyrights, (Aug. 11, 2003), available at www.ntia.doc.gov/ntiahome/occ/dmca/dmca2003/dmcaletter_08112003.html (footnotes omitted).

³² 17 U.S.C. § 1201 (a)(1)(D).

³³ Copyright Office Rec., at 13.

³⁴ Former Assistant Secretary of Commerce Nancy Victory voiced the same concerns in her letter to the Register of Copyrights. There, she stated that “NTIA believes that it would be bene-

C. The Copyright Office's Reliance on Analog Conversions to Satisfy Fair Use Principles is Impractical and Doomed to Obsolescence.

The Copyright Office has consistently argued in denying Section 1201(a)(1) exemption requests that a device's analog outputs are the best avenues for fair use.³⁵ This essentially requires a consumer to take digital content, translate it to analog, and then convert the analog version back to a digital format, to make any lawful digital fair use under the DMCA. Requiring citizens to engage in this cumbersome series of conversions in order to exercise their fair use is no way to ensure that those rights remain vital and accessible to ordinary people. Moreover, as discussed above at pp. 12-13, efforts to close the so-called analog hole may make this "solution" impossible in the near future.

D. The Copyright Office Has Favored Particular Business Models Over Fair Use in Denying Exemption Requests.

Contrary to the express intent of Congress, the triennial rulemaking proceeding has become one that primarily functions to protect particular business models. In the most recent rulemaking, there are a number of instances in which the Copyright Office has apparently favored those business models over fair use principles. For example, faced with a request to exempt the use of ancillary audiovisual works on DVDs the Copyright Office found that

On balance, an exemption, which would permit circumvention of CSS, could have an adverse effect on the availability of such works on DVDs to the public, since the motion picture industry's willingness to make audiovisual works available in digital form on DVDs is based in part on the confidence it has that CSS will protect it against massive infringement.³⁶

Similar instances of the Copyright Office favoring the DVD as a business model over fair use include its decision to deny an exemption to permit consumers to circumventing DVD region coding, despite recognizing that the technology is neither a copy control or an access control, but a mere marketing tool.³⁷ It also denied an exemption to permit viewers to fast-forward through DVD movie previews and advertisements.³⁸

Perhaps the most egregious example of how the Copyright Office has used the DMCA to protect business models involved in the request for an exemption for a class of works "consisting of motion pictures on DVDs tethered to particular operating system, e.g., the Windows or Macintosh environment,"³⁹ to permit consumers to view legally purchased content on his computer platform of choice—specifically platforms that use the increasingly popular Linux and other "open source" operating systems.

While the Register of Copyrights conceded that the proponents of an exemption had successfully identified a "particular class of works" and identified an access control that prevents noninfringing uses, the Register denied the request, stating that

While it is unfortunate that persons wishing to play CSS-protected DVDs on computers have few options, the fact remains that that they have the same options that other consumers have. The Register concludes, as she concluded three

ficial to further define the scope or boundaries of the "class of works" so that targeted exemptions can be crafted that would not only provide specific guidance to both content creator and use, but also remedy the particular harm to noninfringing uses identified in the rulemaking. For example, in some circumstances, the intended use of the work or the attributes of the user are critical to a determination whether to allow circumvention of a technological access control." Letter from Nancy J. Victory, Assistant Secretary of Commerce to Ms. Marybeth Peters Register of Copyrights, (Aug. 11, 2003), available at www.ntia.doc.gov/ntiahome/occ/dmca/dmca2003/dmcaletter_08112003.html.

³⁵"Because users have means of making analog copies of the material on DVDs without circumventing access controls (and of redigitizing those analog copies), there is no need to permit them to circumvent. The desire to make a digital-to-digital copy, while understandable, does not support an exemption in this case. Existing case law is clear that fair use does not guarantee copying by the optimum method or in the identical format of the original." Copyright Office; Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62,016 (Oct. 31, 2003).

³⁶*Id.*

³⁷"When DVD was being considered, the decision was made to incorporate regional coding in order to provide the motion picture companies the ability to maintain that regional marketing practice." Library of Congress, Copyright Office, Rulemaking Hearing, May 2, 2003, Panel 1 Witnesses, 130-1, (Statement of Fritz Attaway, Motion Picture Association of America) available at www.copyright.gov/1201/2003/hearings/transcript-may2.pdf.

³⁸Copyright Office Rec., at 109.

³⁹Copyright Office Rec., at 142.

years ago, that the harm to such persons is *de minimis*, amounting to no more than an inconvenience.⁴⁰

The message to Linux and other open source users is clear: buy a device that is compliant with the current DVD business model and proprietary, closed computer operating systems. The Register's decision ensures that newer, innovative, but less popular technological devices that are not so compliant will not succeed in the marketplace, because they cannot be used for lawful purposes. As discussed above at p. 6, this is exactly what Congress, and in particular the Commerce Committee, feared when it provided for the triennial review—Congress did not want the DMCA to be used to slow or prohibit technological innovation.⁴¹

These examples illustrate the extent to which the Copyright office's stewardship of the DMCA needs further guidance from Congress. H.R. 107 would alleviate many of these concerns by eliminating the need for exemptions for fair uses of digital content.

CONCLUSION

We would like to again thank the subcommittee for providing us the opportunity to testify on this important bill. We are encouraged that this Committee is addressing consumer rights and fair uses in digital media. It is vital for consumers, the public interest, and future digital markets that Congress protects lawful and legitimate uses of copyright works. Passage of the DMCRA will ensure that fair use, consumer notice, and the legitimate tools that enable non-infringing use are not forgotten in the digital world.

Mr. STEARNS. Okay. Mr. Moore, last but not least. You probably have the most technical expertise on the technology side so we appreciate your patience and you are welcome with your opening statement.

STATEMENT OF ROBERT MOORE

Mr. MOORE. Thank you, Chairman. Chairman Stearns and other distinguished members of the subcommittee, my name is Robert Moore, and I am the Founder and President of 321 Studios. This is a software company that was started in St. Louis, Missouri, by me and my wife and my son. Basically, as I said, we are a software company. We have provided more than 1 million DVD consumers with a convenient way to make backup copies of their DVD collections. Our software is designed with many anti-piracy features. It does not affect audio CDs.

In 3 years we created almost 400 jobs and we are on track to achieve \$100 million in sales this year. Today, I appear for my family and the fewer than 60 remaining employees of a company on the brink of annihilation. We are caught with our customers in a nightmarish "Catch-22" created by the courts' incomplete reading of the 1998 Digital Millennium Copyright Act.

Mr. STEARNS. I just want you to pull a little closer. Sometimes when your voice goes low we don't hear it all.

Mr. MOORE. I am most grateful to be here, Chairman.

However, NOT to tell 321 Studios' story for its own sake. Instead, I offer it today as one example among many of why H.R. 107, the Digital Media Consumers' Rights Act, is such vital legislation.

I want to especially thank Reps. Boucher and Doolittle for their tireless dedication to consumers' rights under copyright law, and Chairman Barton and you, Chairman Stearns, for this forum, and ask that my prepared statement and exhibits be included in the

⁴⁰Copyright Office Rec., at 145.

⁴¹See Report of House Comm. on Commerce at 26.

Record. Today, I ask the subcommittee and all Members of Congress to consider three key points:

(1) Our 1 million plus customers—like American consumers in general—are people, not pirates, and we should strike a balance in copyright law for them.

(2) H.R. 107 is needed if the protection for fair use and consumer rights that Congress deliberately wrote into the DMCA is to have any practical meaning in a digital age of content encryption.

(3) Our product is virtually impossible and certainly infeasible to use for real piracy as distinct from reasonable consumer use of copyrighted works. Let me take these points in order.

First of all, our customers are ordinary and honest Americans. They are moms and dads, artists and educators, librarians and movie buffs just like myself. These customers just want to keep their expensive collections safe so they can enjoy them for years to come. They collectively have paid Hollywood billions of dollars for DVDs that, as widely reported recently, we now know to physically rot and degrade in a short period of time and to be easily damaged by toddlers, teens or harsh conditions of all kinds. A copy of those reports is attached for the record, as well.

Our customers tell us that they want and need to make backup copies of their DVDs for several reasons. (1) To protect their investment from loss, damage or theft. (2) To play in their minivans and on airplanes when they are on travel to ensure they will have a copy even when the original goes out of print.

Also so they don't have to replace an entire box set of multi DVDs if one of these disks is damaged. Our customers have also explained this to Congress directly and I would like to submit for the record a disk containing brief electronic copies of more than 175,000 individual communications made to Congress in just the last year in support of 321 Studios advocacy on this issue.

Mr. STEARNS. By unanimous consent so ordered.

Mr. MOORE. Pardon me, Chairman?

Mr. STEARNS. By unanimous consent so ordered. It will be part of the record.

Mr. MOORE. Thank you, sir. The second point. The issue raised by H.R. 107 and squarely before the subcommittee today is not whether piracy is bad or the industry deserves to be protected from it. I will be the first one to say absolutely yes on both counts.

The real, practical and very pressing question dramatically highlighted by the experience of 321 Studios is simply this: If consumers can make a personal copy of an audio CD they've bought to put on their iPod or play in their automobile, if consumers can use a VCR or TiVO or even a Replay which was, as we found out today, recently put out of business through litigation, if consumers can use these tools to make a digital copy of a movie on broadcast or cable—I hope I can still say digital—if consumers can use conventional and digital photocopiers and digital scanners to reproduce pages from a book, and if consumers can make backup copy of a computer program like Windows, how can it be that consumers are criminals for making a backup copy of a DVD they bought and paid for? Why is our company, indeed any technology company, criminal for selling them the digital tools that they must have to make these rights real?

The third and final point, we at 321 Studios also are honest, hardworking, middle American folks who love movies and respect copyright. That is not a disingenuous statement, Chairman. To begin with, we did not hide offshore from Hollywood or wait to get sued.

Long before any action was filed against us 321 Studios actually asked a Federal judge in California to issue a declaratory ruling that consumers had a fair use or another personal right to make a backup copy of DVDs under the DMCA and, therefore, that our product was legal. Incredibly the court did not reach the question of what the DMCA's explicit consumer protection clause meant. Never even got there.

Judge us now by how we designed and marketed our software. Frankly, anyone who tries to use it to mass produce bootleg DVDs would immediately become a strong contender for dumbest criminal of the year in my opinion. I say this confidently for a host of reasons.

Our software can only make backup copies one at a time. It typically takes an hour or more to copy a single DVD. Moreover, we block the user from making a copy from a copy. Thus, high speed mass production is literally impossible with our product.

Two, every copy of our software must be registered to be usable and every backup DVD is invisibly watermarked throughout the copy so that if it is improperly distributed or sold, it can be traced back to the person that is using this product.

Third, the software actively eliminates any digital copy of the original DVD from the computer during the process of making the backup copy so there is literally nothing on the computer to upload to the Internet. Make no mistake, Chairman, this issue is not about Napster. It is not about peer-to-peer file sharing.

Finally, I will close with this. 321 repeatedly has offered to work with movie-makers consistently over and over so that the back-up copies made by our product also would be encrypted or further rights included on the backup. They have consistently not only refused us, they have turned a deaf ear every single time.

We are at a watershed moment, Mr. Chairman. As 321 Studio's story makes all too clear, H.R. 107 is critical to rescuing the public from this DMCA "Catch-22" never intended by Congress. For my family, for my company, for millions of consumers who simply want to make a personal backup copy of a DVD without fear of persecution or prosecution, I implore this committee and all Members of Congress to cosponsor and pass H.R. 107. Thank you, Mr. Chairman.

[The prepared statement of Robert Moore follows:]

PREPARED STATEMENT OF ROBERT MOORE, FOUNDER & PRESIDENT, 321 STUDIOS

Chairman Barton, Chairman Stearns, Representatives Dingell, Schakowsky, and Members of the Subcommittee: My name is Robert Moore, and I am the Founder and President of 321 Studios of St. Charles, Missouri—a company started in my basement with 3 family members in 2001. 321 Studios is a software company. We have provided more than 1 million DVD consumers with a convenient way to make backup copies of their DVD collections. Our software is designed with many anti-piracy features. It does not affect audio CDs.

In three years we created almost 400 jobs and achieved 100 million dollars in sales. Today, I appear for my family and the fewer than 40 remaining employees of a company on the brink of annihilation, caught with our customers in a night-

marish “Catch-22” created by the courts’ incomplete reading of the 1998 Digital Millennium Copyright Act.

I am most grateful to be here, however, NOT to tell 321 Studios’ story for its own sake. Instead, I offer it today as a surreal *example* among many of why H.R. 107, the Digital Media Consumers’ Rights Act, is such vital legislation.

I want to especially thank Reps. Boucher and Doolittle for their tireless dedication to consumers’ rights under copyright law, and Chairman Barton and Chairman Stearns for this forum, and ask that my prepared statement and exhibits be included in the Record. Today, I ask the Subcommittee and all Members of Congress to consider three key points:

- ONE: 321 Studios 1 million plus customers—like American consumers in general—are people, not pirates, and we should strike a balance in copyright law for them.
- TWO: Our product is virtually impossible to use for real “piracy”—high-speed volume bootlegging and internet distribution—as distinct from reasonable consumer use of copyrighted works.
- THREE: H.R. 107 is needed if the protection for fair use and consumer rights that Congress deliberately wrote into the DMCA is to have any practical meaning in a digital age of content encryption. Let me take these points in order...

POINT ONE

Our customers are ordinary and honest Americans: moms and dads, artists and educators, librarians and movie buffs. These customers just want to keep their expensive collections safe so they can enjoy them for years to come and they expect to be able to use DVDs like they use other legally obtained *unencrypted* media. They collectively have paid Hollywood billions of dollars for DVDs that—as CNN and the Associated Press reported just yesterday and last week—we now know to physically rot and degrade, and to be easily damaged by toddlers, teens or harsh conditions of all kinds. A copy of those reports is attached for the record, as well.

Our customers tell us that they also use our software to assure their ongoing access to titles they’ve bought that later go out of distribution, and to restore single disks included in expensive boxed sets that cannot be purchased individually.

Please allow me to submit for the record a disk containing brief statements, entirely in their own words, from just five of the literally thousands of testimonials our customers have taken the time to provide to us. A transcript is also attached.

I would also like to submit for the record a disk containing electronic copies of the more than 160,000 communications made to Congress in support of 321 Studios advocacy on this issue since we launched our website in December of 2002.

POINT TWO

We at 321 Studios also are honest, hard-working, middle-American folks who love movies and who respect copyright. To begin with, we didn’t hide offshore from Hollywood or wait to get sued.

Long before any action was filed against us, 321 Studios actually asked a federal judge to issue a declaratory ruling that consumers had a fair use or other right to make a backup copy of encrypted DVDs under the DMCA and, therefore, that our product was legal.

Incredibly, the court didn’t reach the question of what the DMCA’s fair use “savings clause” meant. It just mechanically ruled our software to be an illegal “circumvention” tool and didn’t address the question we had asked. Sued later by Hollywood, we were enjoined from marketing 321 Studios’ software and consumers were cut off from our product: one they need in an encrypted marketplace to make their fair use rights real.

Judge us also, please, by how we designed and marketed our software. Frankly, anyone who tries to use it to mass produce bootleg DVDs would immediately become a strong contender for “Dumbest Criminal of the Year.” I say this confidently for a host of reasons:

1. Our software can only make backup copies one at a time and it typically takes an hour or two to copy a single DVD. Moreover, we block the user from making a copy from a copy. Thus, high-speed mass production is literally impossible with 321 Studios’ product.
2. The encryption placed on the original DVD by a movie studio is wholly unaffected by 321 Studio’s software;
3. Every copy of our software must be registered to be useable and every backup DVD is invisibly “watermarked” throughout the copy so that—if improperly distributed or sold—it can be traced back to the person misusing the software to violate copyright law.

4. The software actively eliminates any digital copy of the original DVD from the computer during the process of making the backup copy so there is literally nothing on the computer to “upload” to the Internet. Make no mistake: this issue is not about Napster or peer-to-peer file-sharing.
5. Finally in this regard, 321 Studios repeatedly has offered to work with movie-makers so that the back-up copies made by our product also would be encrypted. They consistently have refused, preferring to argue that we are “pirates” because the backup DVDs that our software helps consumers make are unencrypted!

POINT THREE

The issue raised by HR 107 and squarely before the Subcommittee today is *not* whether piracy is bad or the industry deserves to be protected from it. The answer to those questions is clearly “yes” on both counts.

The real, practical and very pressing question dramatically highlighted by the experience of 321 Studios is simply this:

“If consumers can make a personal copy of an audio CD they’ve bought to put on their iPod or play in their car...

“If consumers can use a VCR or TiVO to make a tape or digital copy of a movie on broadcast or cable TV...

“If consumers can use conventional and digital photocopiers, and digital scanners, to reproduce pages from a book...

“If consumers can make a backup copy of a computer program like Windows...

“Then, how can it be that consumers are criminals for making a backup copy of a DVD they’ve bought and paid for and why is our company—indeed any technology company—criminal for selling them the digital tools that they must have to make their rights real?

CONCLUSION

We are at a watershed moment, Mr. Chairman. As 321 Studio’s story makes all too clear, H.R. 107 is critical to rescuing the public from this DMCA “Catch-22” never intended by Congress.

For my family, for my company, for millions of consumers who simply want to make a personal backup copy of a DVD without fear of persecution or prosecution...I implore this Committee and all Members of Congress to cosponsor and pass H.R. 107.

Thank you, Mr. Chairman. I look forward to your questions.

Mr. STEARNS. I thank you and I will start with my questions. Mr. Moore, I think you make a very good case for allowing families or individuals to make one backup copy. You mention there is a watermark that you could identify. You say it is almost impossible to use your technology for piracy because who is going to spend all that fripping time if it takes so long to use your software to do one copy. I think you have given a lot of reasons why real piracy is not going to come from your technology.

Let me ask you about GamesXCopy product. You have also received challenge from the content community for that. Explain to me what the problem is there.

Mr. MOORE. I am not ware of any challenge to that particular product. GamesXCopy is—

Mr. STEARNS. Hold on 1 second. Just wait. This is a vote, I think. Go ahead.

Mr. MOORE. For lack of a better term, it is a virtual CD drive for a person’s computer. They don’t have to physically have the game CD in their drive in order to use it. As our customers have found out, this wears out the CD very quickly. We don’t have to bypass any technical protection measure in order to make that happen so GamesXCopy we believe is clearly delineated by Section 117 of the consumer having the right to make a backup copy of a software.

Mr. STEARNS. So you have had no challenges on that?

Ms. ROSE. Well, actually—

Mr. STEARNS. Ms. Rose.

Ms. ROSE. There have been no formal challenges to that and the ESA member companies are analyzing the product and keeping their options open with regard to what strategies they may like to pursue in the future.

Mr. STEARNS. So at this point you haven't ruled out the possibility that you could challenge it?

Ms. ROSE. Correct.

Mr. STEARNS. Okay. Mr. Moore, do you support restoration of the Sony decision?

Mr. MOORE. To the extent that it absolutely reinforces the consumers have a personal use of property that they lawfully acquired, absolutely.

Mr. STEARNS. Okay. Mr. Murray, won't removing the barriers to accessing protected materials do a disservice to customers, consumers, because companies will be less inclined to use insecure formats for distributing their protected material?

I mean, I heard that earlier on the second panel. They made this big argument that, you know, one of the reasons why we are successful with intellectual property and we are so creative is because we have this protection and the companies feel very secure that they can go ahead and give their creativity and their products will be protected. I guess the question is wouldn't that create insecure formats for distributing these protected material?

Mr. MURRAY. Well, I think there are two questions there. One is what is wrong with the DMCA as it stands? What I was trying to get out by talking about printer cartridges and garage door openers is the fact that companies are asserting when there would not be a copyright that would allow them normally to say, "Hey, you can't copy this material."

Like in the case of a garage door opener when you send an access code, they are allowing people to sue companies because they are circumventing something where copyright can't sort of hold in the first instance. What I am concerned about is the anti-competitive effects for entrepreneurs who want to bring products to market when copyright wouldn't normally be in play they are now getting challenged through the anti-circumvention provisions.

But to address your question more directly, these systems will never be 100 percent secure. We are not suggesting that companies can't employ DRM in the market place. The status quo for consumers right now is even though the law says, "Hey, you have fair use rights. You have certain things you can do with content," technology has left consumers short. The status quo is that rights that the law affords are simply not present.

I guess what I am saying is I see technology coming to market rights management solutions that allow one copy, five copies, etc. Forgive me if I am exceeding my time but I think that these technologies that are coming to market—forgive me for losing my train of thought.

Mr. STEARNS. Let me keep going on here. Mr. Sherman, you heard Mr. Moore talk about you can't use his technology to develop a large number of copies. A couple of members asked is it possible,

is there technology that would in effect allow one copy to be made and that would be it? Mr. Moore has indicated there is. He has this. Isn't that true, Mr. Moore?

Mr. MOORE. Yes.

Mr. STEARNS. Let us be very clear in this hearing that Mr. Moore is saying we have arrived, we have the technology and we will do this. We will allow one copy. There will be a watermark. We can trace if somebody pirates this and uses it for something else. Isn't it possible we could reach a compromise with him and allow him to sell this product? I mean, is there no compromise you see based upon what you hear?

Mr. SHERMAN. Well, the fact that technologies are available to limit the number of copies makes perfect sense and is an obvious area to work things out in ways that meet consumer expectations.

I think the problem with Mr. Moore's product is that in order to make that one copy, he strips out the encryptions so that people can then use that copy to make other copies so you need to be able to make a secure copy so that itself cannot be copied endlessly. I was impressed to find that Jack Valenti held up a copy that obviously was a pirate copy being sold. Maybe that was the dumbest criminal that wins the award but somebody was selling in Chinatown in Washington a pirate copy of a movie—

Mr. STEARNS. Without the encryption. A Run-Away Jury.

Mr. SHERMAN. 321, yeah.

Mr. STEARNS. What do you say, Mr. Moore, to that? You strip off the encryption and, bingo, there we are.

Mr. MOORE. Let me address both of these things in sequence. First of all—

Mr. STEARNS. And then I will conclude.

Mr. MOORE. With respect to the fact that the backup copy doesn't have the encryption, Mr. Sherman is absolutely aware that is an impossible task given the current technology that is available to our company. Through a combined effort of working with technology companies like ourselves, a solution could quite easily be reached that would satisfy that concern. I can address that in more detail if the subcommittee would like, but I would just like to say for the record that the technology absolutely exists to re-encrypt this content in such a way that would satisfy that concern.

The second thing I would like to say with respect to this Run-Away Jury video that Mr. Valenti held up this morning and said that he had purchased in Chinatown and I don't doubt that he did. I don't doubt that—

Mr. STEARNS. It had 321 on it.

Mr. MOORE. That is exactly right. I don't doubt that someone has now come to our attention that has used the software for an illicit purpose. That would make the second time in the last 3 years out of a million customers that this has been brought to our attention.

I would also like to point out that because of the anti-piracy features that we built in to that product voluntarily because we do respect the rights of copyright holders, they were able to identify, No. 1, that it was indeed a backup made with our software and not perhaps 50 other pieces of software that currently circulate on the Internet and don't show the same respect for copyright holders.

No. 2, if they had come to us and asked, we would have clearly pointed out that there is other forensic evidence in that video stream that would clearly identify the perpetrator and the person who was doing that. We want to work with the content community to find a way to satisfy these concerns. We have been shut out.

Mr. STEARNS. My time has expired. Let me ask the gentleman from California, we have about 7½ minutes left. You are welcome to go if it is a short event, or we will recess the committee and come right back. We only have one vote so we are moving to the end of this if you will be patient. Would you like to have maybe 2 minutes or do you want to come back and get a full 5 minutes? I think we will recess and come back right after the vote.

[Whereupon, the subcommittee went off the record at 2:57 p.m.]

Mr. STEARNS. The subcommittee will reconvene.

Mr. Otter, you are up for questions.

And I also want to thank the third panel for their patience and forbearance.

Mr. OTTER. Thank you, Mr. Chairman.

I apologize for having absented myself from the hearing, and so if I ask a couple of questions here that are redundant from earlier questions perhaps asked by the committee, I apologize for that.

Mr. Moore, does 321 studios encrypt or take other measures to protect the software that you make?

Mr. MOORE. Yes, Congressman, we do.

Mr. OTTER. Why?

Mr. MOORE. We do it for the purposes of insuring that our anti-piracy measures that we have built into our product have some teeth.

Mr. OTTER. You do not do it to protect your own invention, your own creation?

Mr. MOORE. To some extent, I would say yes, but in large part, I would say that the majority reason there is because we want to give teeth to our anti-piracy features. In fact, we allow multiple copies of our product to be installed on a number of computers by our customers.

Mr. OTTER. If 107 were to pass, would that also take the encryption off of your software?

Mr. MOORE. Congressman, it is my understanding that H.R. 107 is not about removing encryption from DVDs; that it is about whether or not consumers have the right to bypass the technological protection measure in order to avail themselves of a fair use.

Mr. OTTER. All right. Let me ask that in a different way then. Would you have a problem if 107 included being able to bypass the encryption on 321 Studio encryption?

Mr. MOORE. Well, I would assume that you mean for a non-infringing use, and, no, sir, I would not have a problem with that.

Mr. OTTER. So you would—

Mr. MOORE. In fact, that happens right now with our software.

Mr. OTTER. Could I use right now your software and duplicate your software so that I would have a backup system in case anything went wrong?

Mr. MOORE. Yes, sir, you could. You could most certainly make a backup copy of our software.

Mr. OTTER. How many times could I duplicate that?

Mr. MOORE. Multiple times.

Mr. OTTER. Could I? Well, so you don't believe then that there is any need for you to protect your software.

Mr. MOORE. Well, as I stated before, the primary reason that we include the activation feature in our software that we do is to give teeth to the anti-piracy measures that we included. They are not disingenuous in nature.

But further to your question, we want to have some control over the people that are using our software as we felt that we had a responsibility as honest American consumers to do the right thing, and that is the right thing, in our opinion, is to keep some control over it so that people are using it for its intended purpose.

Mr. OTTER. Well, don't you think though that that is what the entertainment business is doing, is keeping some control over the distribution and use of their creative efforts on DVDs, on music, on movies, on whatever?

Mr. MOORE. As I testified before, Mr. Otter, I absolutely agree with the studio's position and always have, that they have a right to protect their intellectual property. They have a right to be wary of piracy and problems that are currently in the marketplace. And I see those as tools of distribution that could absolutely hamper their efforts to make a profit, to make a fair return on their investment.

However, I believe that ends at tools of consumption where consumers use a tool specifically for their own personal use and do not impact the rights of the copyright holder from a distribution standpoint is where I firmly believe the consumer has the right to do so.

Mr. OTTER. Well, then why bother with encryption at all?

Mr. MOORE. Are you asking me why the studios encrypted DVD?

Mr. OTTER. Yeah.

Mr. MOORE. I am not aware that all DVDs are encrypted with CSS. I am not sure what their reasoning is for encrypting the DVDs with CSS since the massive tools of piracy do not rely on circumventing CSS at all in order to actually reproduce and manufacture fraudulent copies of DVDs overseas right now.

So you would need to ask the studios why they encrypted with CSS. I cannot answer for them.

Mr. OTTER. Did you hear Mr. Valenti's testimony earlier?

Mr. MOORE. Yes, sir.

Mr. OTTER. Do you agree with his conclusion that if we were to take off the certain controls that we have now through encryption, it would adversely affect not only our trading agreements, but our balance of trade? Do you agree or—

Mr. MOORE. I did hear him say that, and, no, I do not agree with that statement.

Mr. OTTER. You do not agree with it?

Mr. MOORE. No, sir, I do not.

Mr. OTTER. So you know, the fact that the employment has dropped, as I read in the testimony, down to 40 from an all time high of was it 400? I apologize.

Mr. MOORE. It was 400 employees, yes, sir.

Mr. OTTER. You do not think something similar would happen in the entertainment industry if we were to remove the controls that the industry has over itself right now?

Mr. MOORE. Sir, you are asking me to hypothesize, and I do not need to hypothesize. We have a million consumers. Our product has been the No. 1 seller on retail shelves for the last 3 years, and we have uncovered, I believe, one or two cases now of people using our product for a copyright infringement.

There is no reason to hypothesize here. No, I do not believe that it will cause any harm as evidenced by the statistical history of what has happened.

Mr. OTTER. Well, I would just conclude, Mr. Moore, by saying do not ask this committee to hypothesize either that you know every one of those customers.

Mr. MOORE. Congressman, I am not asking you to hypothesize. I am asking this committee to look at H.R. 107 and give the benefit of doubt to American consumers. We are part of a democracy where the underlying principles of our country are that we presume innocence before guilt.

And what the DMCA has done in its interpretation of the DMCA is it has presumed guilt before innocence, and that is the problem that I have with it. That is the problem that my customers have it.

Will some people use this product for an infringing purpose? Absolutely. I would be foolish to tell you otherwise. Will people run red lights? Absolutely. People do that every single day.

We do not put steel spikes in front of red light intersections because that happens. We expect most people to obey the law, and most people do. Most people respect the rights of copyright holders, and I can speak very firmly for my customers who absolutely believe in the rights of copyright holders.

But they also believe they have a right to their own property; that they have taken money out of their own wallet and pay for.

Mr. STEARNS. The time of the gentleman has expired.

Mr. OTTER. Thank you, Mr. Chairman.

Mr. STEARNS. The gentleman from California.

Mr. ISSA. Thank you, Mr. Chairman.

And I realize that this is now the third panel. So sometimes the questions are being asked to a certain extent because I didn't get to ask it to the other guy. So please forgive me, but, Mr. Moore, I'll probably concentrate a little bit on your here.

Mr. MOORE. I will try and take that as a compliment.

Mr. ISSA. Well, you know, you are kind of the reason for this. Do you know what tokenism is? Sometimes it is a good thing, and you are it. You are the case where it appears as though you did make a good faith effort to make the circumvention less than a Napster, to try to bring some order to the business of backup copies.

But I have to ask you a series of questions.

Mr. MOORE. Yes, sir.

Mr. ISSA. One of them is you heard Mr. Swift, former congressman earlier today, and you heard him describe—now, this was music, not DVDs—you heard him describe that he owns licenses and that he owns copies of CDs, and he takes a cutoff this record

and a cutoff that record. I'm sorry. I'm showing my age with the word "record."

But he takes a digital record off of each of these that happens to be a song, and he puts it into a new piece of art, which he thinks he has created, and he gives it out to friends and family.

If your product allowed for people to do that or if they made part of a movie or if DVDs some day had four movies and they did one of the four and then another one from a different DVD and put it together and gave it out to their friends, would they be in your opinion, because you do look at the copyright laws and not exceeding fair use, do you think that that exceeds fair use? That that is wrong, that is taking of a property?

Mr. MOORE. Let me preface my opinion with a simple disclaimer, if I may, Congressman. I'm not a lawyer. I'm not a copyright lawyer. I am—

Mr. ISSA. These are all good things.

Mr. MOORE. I am strictly a layman from that perspective. I would not even begin to insinuate that I have a right to come here and lecture this body on the rights and wrongs of copyrights.

For me personally, the copyrights and "copywrongs," as I have called them, simply boil down to either one or two things, and that is it's either an act of distribution or it is an act of consumption. For me personally, speaking only for myself and for no other person in this room, I believe that an act of consumption is pretty much self-defining.

Mr. ISSA. Okay.

Mr. MOORE. You consume a product that you own in a way that is personally evident to you, perhaps your immediate family members. That is an act of consumption.

To the extent that you distribute a product—

Mr. ISSA. Sure. Following up on that, if I buy a book, a book by historic definite, only one person can read it at a given second unless you are reading, you know, literally reading to your children, but if I make a copy of a DVD using your product and then I make an additional copy and I give one to my son and one to my wife and I have one, and for whatever reason all three of us are in different rooms watching at the same time, isn't that beyond the scope of a single license? And isn't that one of the problems that you presently have with your product, is it does allow for the potential that people would take one product, one right and turn it into three simultaneous requests?

Mr. MOORE. Speaking as someone from the software industry, you are presupposing that the DVD is sold to me as a consumer under the guise of a license. I am aware of no such license.

When I purchase software, there is an end user license agreement that is wrapped around the software, and in many cases it does limit my rights in terms of how many places I can use that. DVD does not do that.

Mr. ISSA. Okay, but let me switch maybe to one other direction, and again, I apologize to the rest of you. You are not chopped liver, but I am focusing on one member here in my limited time.

If you had the ability to modify your product to include checking with each of the studios that own the right to that copyright, if you were interfacing with a data base, and if your product would only

allow for one copy per licensed original user and per a given machine, one, is this something that you have envisioned being able to do and, two, do you believe that your product would still sell just as well if you did that?

Mr. MOORE. Well, I believe that there are technological restrictions that could be placed even further on the product than we have in concert with the entertainment companies that would absolutely address those issues, and yes, I believe that provided that the product is not absolutely drowning in digitalized management, that it would continue to sell just as well because there is clearly a market demand for this product.

But, again, I am not a copyright lawyer, and one of the things that I believe I understand about H.R. 107 to begin with, and excuse me, Congressman Boucher if I am speaking out of turn here, but I believe your bill states that fair use is not something that we need to determine now or that H.R. 107 is determining, but courts of competent jurisdiction down the road would then be able to determine whether or not something was a fair use based upon whether somebody was actually committing copyright infringement or not, and that that would be the determination as to whether or not someone was violating a technological protection measure.

Mr. ISSA. Mr. Chairman, if I can just make a quick statement for the record, for what it is worth, I do believe that this committee has a role to play in more thoroughly having the public understand fair use because I think this morning a former member of this committee, an honorable man, told us he was doing something which he believed was right and which I believe is exactly what fair use was not intended to mean.

You cannot, in my opinion, just make unlimited copies and give them out slightly different and say it is fair use just because you are not charging for them. It is the core of one of the things that Congress has to help put into law if we are, in fact, going to insure the rights of intellectual property.

Thank you, Mr. Chairman.

Mr. STEARNS. The gentleman's time has expired.

And we have finished with the members of the subcommittee. And now as a courtesy, we will give the author of the bill the final questions before we conclude the subcommittee hearing.

Mr. Boucher.

Mr. BOUCHER. Well, thank you very much, Mr. Chairman, and I want to thank you for permitting a member of the full committee who is not a member of this subcommittee to take part in your hearing from the perspective of questioning witnesses.

Mr. Jaszi and Ms. Sohn, let's give you an opportunity to take part in this conversation. We heard earlier from Professor Lessig that in his opinion, the DMCA potentially can extinguish fair use in the digital era. I would assume that both of you would agree that there is that potential. Just a one-word answer would be satisfactory.

Ms. JASZI. Yes.

Ms. SOHN. Yes.

Mr. BOUCHER. Thank you.

In response to that, the creative community says not to worry. We have a process at the Copyright Office that is designed to pro-

tect fair use, and that process has now been functioning for 6 years, and that is really all the protection that fair use needs with respect to the DMCA.

Would you, Professor Jaszi and Ms. Sohn, agree with that statement?

Professor Jaszi, Ms. Sohn.

Ms. SOHN. Well, I am happy to answer that unqualifiedly no, and I would like to give several reasons for that.

Mr. BOUCHER. Please.

Ms. SOHN. The first is that in our opinion the Copyright Office has really raised the burden of proof for an exemption to an extent that is not in the plain language of the statute. They are asking for proponents of an exemption to show that there is substantial harm to their noninfringing uses, and that word is not in the statute.

Second the Copyright Office does not look at the types of uses that people make with the digital media that they are trying to get an exemption for. And, in fact, what is interesting is that the Assistant Secretary of Commerce for Communications and Information in the two triennial reviews that have been had in the 6 years has written letters to the Register of Copyrights protesting the burden of proof saying that it was contrary, in very strong language, contrary to plain language of the DMC and the exemption provision and also protesting the fact that the Copyright Office does not look at the type of uses that people make with digital media.

Mr. BOUCHER. Thank you.

Professor Jaszi, would you care to comment?

Mr. JASZI. I just would add that there is a structural problem with the rulemaking which is, I think, a function of the statutory design itself, and that is that although the rulemaking holds out the promise of a possible exception for circumvention conduct, an exception that individuals or institutions might be able to avail themselves of were they able to satisfy the standard that the rulemaking applies; that exception is only with respect to circumvention conduct and not in any sense related to devices or technologies.

So that the promise of the rulemaking, however great or small, is in that respect a false promise since the best, the individual or the institution that has successfully prosecuted their claim for an exception has a theoretical right to use, but in all likelihood no ability to take advantage of that right.

Mr. BOUCHER. All right. Thank you both for those answers.

Let me simply note that over the 6-year timeframe that this process has been in effect, only four exemptions have been granted. Many multiples of that number have been requested. In fact, 25 entire groups of requests limited together have been rejected.

The Librarian of Congress said the following. This is in writing, quote: "As presently written, the statute places considerable burdens on the scholarly, academic, and library communities to demonstrate and even to measure the required adverse impacts on users."

And the Librarian of Congress has recommended to the Congress that the statute be changed so as to make the process more available and more useful.

The Assistant Secretary of Commerce also said that the standard employed, and I quote, imposes a significantly heightened burden on proponents of an exception and is, therefore, inconsistent with the opportunity Congress intended to afford the user community.

So both of the principles who are charged with administering this process have essentially given it a failing grade and have said to the Congress if you want this to be a usable process, you are going to have to change it.

And, Mr. Chairman, I think that information belongs in the record, and I appreciate your giving me the opportunity to pursue this line of questioning.

It has been a very long day. I have a lot of other things I would like to discuss with these witnesses, but I am going to forebear, and I trust that we will have further opportunities in this committee to consider these various measures.

Thank you very much, Mr. Chairman.

Mr. STEARNS. Yes, and I just want to thank the author of the bill for his contribution. I want to thank the third panel for waiting for us for the conclusion of our votes.

By unanimous consent, members will have 5 days to submit questions for the record, and with that, the subcommittee is adjourned.

[Whereupon, at 4:26 p.m., the subcommittee meeting was adjourned.]

[Additional material submitted for the record follows:]

RESPONSE FOR THE RECORD OF THE ENTERTAINMENT SOFTWARE ASSOCIATION TO FOLLOW-UP QUESTIONS OF HON. JOHN SHADEGG

Based on the nature of the questions, ESA will provide a joint answer to Questions 1-12.

QUESTION 1: Do you contend that under the "fair use" doctrine or the "right of fair use," an individual may make a back-up copy of a CD, a DVD, or software?

QUESTION 2: If so, provide the legal basis for your opinion.

QUESTION 3: Do you contend that under the "fair use" doctrine or the "right of fair use," an individual may make a back-up copy of a CD, a DVD, or software for their spouse?

QUESTION 4: If so, provide the legal basis for your opinion.

QUESTION 5: Do you contend that under the "fair use" doctrine or the "right of fair use," an individual may make a back-up copy of a CD, a DVD, or software for their children?

QUESTION 6: If so, provide the legal basis for your opinion.

QUESTION 7: Do you contend that under the "fair use" doctrine or the "right of fair use," an individual may make a back-up copy of a CD, a DVD, or software for any other family member?

QUESTION 8: If so, provide the legal basis for your opinion.

QUESTION 9: Do you contend that under the "fair use" doctrine or the "right of fair use," an individual may make a back-up copy of a CD, a DVD, or software for a friend?

QUESTION 10: If so, provide the legal basis for your opinion.

QUESTION 11: Do you contend that under the "fair use" doctrine or the "right of fair use," an individual may make a back-up copy of a CD, a DVD, or software for use in a second location, such as a car or a boat?

QUESTION 12: If so, provide the legal basis for your opinion.

RESPONSE TO QUESTIONS 1-12: ESA does not believe that the "fair use" doctrine, as codified in Section 107 of the Copyright Act, categorically authorizes any of the acts of copying described in Questions 1-12.

The U.S. Supreme Court has called fair use an "equitable rule of reason," and has held that "each case raising the question must be decided on its own facts." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 and n. 31 (1984) (citing H. Rept. 94-1476, the House Report on the 1976 Copyright Act, at 65.) The codi-

fication of the doctrine identifies four factors to be considered by the courts, although this is not an exhaustive list.

Some of these factors would weigh against recognizing a fair use privilege to make copies in the scenarios identified in Questions 1-12. For example, copying a work in its entirety is disfavored under the third statutory factor (“the amount and substantiality of the portion used in relation to the copyrighted work as a whole”), and copying alone is generally not considered a “transformative” use, which is a key test that courts apply in evaluating the first statutory factor (“purpose and character of the use”). *See generally Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

In its 1984 decision in the *Sony* case, cited above, the Supreme Court ruled 5-4 that making a copy of a free over-the-air television broadcast for the purpose of time-shifting (later viewing) was a fair use. However, the scenarios in Questions 1-12 are all distinguishable from the facts in the *Sony* case—for example, in Questions 3, 5, 7, and 9 the hypothetical copies were made for the purpose of transferring it to another person while retaining the original. In contrast, the *Sony* Court specifically noted that its ruling did not apply to “the transfer of tapes to other persons.” *Sony*, 464 U.S. at 425. We are not aware of any authoritative judicial precedent that has found a fair use privilege to make copies in any of these circumstances.

Based on the nature of the questions, ESA will provide a joint answer to Questions 13 and 14.

QUESTION 13: If you believe that under the “fair use” doctrine or the “right of fair use,” an individual may make a copy of a CD, a DVD, or software for any of the above-named individuals or purposes, do you believe that Congress should allow by statute such copies to be made?

QUESTION 14: If so, for what individuals or purposes?

RESPONSE TO QUESTIONS 13 and 14: ESA does not support amending the Copyright Act to allow for unauthorized copying of copyrighted materials in the circumstances outlined in Questions 1-12. We support the courts’ continued application of existing law—including the codification of the fair use doctrine in Section 107—to the cases that come before them.

QUESTION 15: The Home Recording Act of 1992 makes it a non-infringing act to make a copy of an audio recording for personal use. If such recordings are covered by the “doctrine” or “right” of “fair use,” why did Congress explicitly have to grant that right in 1992?

RESPONSE TO QUESTION 15: ESA agrees that, to the extent that the activities covered by the Audio Home Recording Act already benefited from the fair use privilege, it would not have been necessary for Congress to prohibit any infringement actions from being brought against consumers who engage in these activities.

QUESTION 16: If you contend the doctrine of “fair use” covers the making of a copy—for backup, family, friends, etc., would it be a violation of “fair use” to require people to secure permission from the producer of a creative work before making the copy?

Question 16 is not applicable.

QUESTION 17: If so, provide the legal basis for your opinion

Question 17 is not applicable.

QUESTION 18: Is there any device that can reliably distinguish between “fair use” and any other use? If not, wouldn’t enactment of H.R. 107 inevitably make it easier to infringe copyright—even if it also made it easier to carry out some “fair uses?” Why should copyright infringement be facilitated and encouraged?

RESPONSE TO QUESTION 18: ESA believes the record is clear: there is at present no device that can reliably permit fair uses while preventing unlawful uses that do not qualify under the fair use doctrine. Accordingly, we agree that enactment of H.R. 107 would have the substantial effect of facilitating copyright infringement, even though it may also facilitate some non-infringing uses. We do not believe that copyright infringements should be facilitated or encouraged.

QUESTION 19: If no software or technology exists to distinguish between “fair use” and any other use, how do you propose that producers protect their rights over their creative products and protect such products from being copied multiple times?

RESPONSE TO QUESTION 19: Producers should use the tools currently provided by the Copyright Act and other provisions of federal law, including the DMCA. In ESA’s view, enactment of H.R. 107 would significantly undermine the ability of producers of copyrighted materials to protect their rights and to prevent widespread multiple unauthorized copying for the reasons stated above.

Based on the nature of the questions, ESA will provide a joint answer to Questions 20-24.

QUESTION 20: If you believe that the doctrine of “fair use” gives users the right to make one backup copy, or if you believe Congress should grant such a right, would this right be satisfied if the artist or producer of the intellectual property provided two encrypted copies of a CD, DVD, or software product, neither of which could be duplicated, instead of permitting technology that allows users to make duplicate copies independently?

QUESTION 21: If not, why?

QUESTION 22: If you believe that the doctrine of “fair use” gives users the right to make multiple copies (for backup, family, friends, alternate location, etc.) or if you believe Congress should grant such a right, would this right be satisfied if the artist or producer of intellectual property provided multiple encrypted copies of a CD, DVD, or software product, none of which could be duplicated, instead of permitting technology that allows users to make duplicate copies independently?

QUESTION 23: If not, why?

QUESTION 24: If you do not believe that the “fair use” right of individuals would be satisfied if artists or producers of intellectual property provided two or more copies of the creative work to the purchaser, and instead believe that technology which circumvents encryption is the only means to secure copies under the “fair use” doctrine, provide the legal basis for your opinion.

RESPONSE TO QUESTIONS 20-24: While these questions are inapplicable to ESA because of our views on the current doctrine of fair use (See answers to questions 1-12 *supra*) and on the inadvisability of Congressional enactment of an exception to copyright in this area (See answers to questions 13-14 *supra*), we believe that the decision to provide or not to provide consumers with extra encrypted copies of copyrighted products should be resolved in the marketplace. Of course, consumers are already free to buy additional legitimate copies for family, friends, and additional locations.

QUESTION 25: Please indicate whether you would agree or disagree that this problem could be solved by the marketplace with a disclosure on CDs, DVDs, and software products stating that the product may not be duplicated unless the purchaser is willing to pay a higher price for a copy of the work that can be duplicated.

RESPONSE TO QUESTION 25: ESA agrees that these issues are best resolved in the marketplace, not by legislative fiat. ESA member companies are actively engaged in educational efforts to inform consumers about permitted and prohibited uses of our products and are constantly striving to improve our performance in this regard. We believe that decisions on whether or not to offer versions of copyrighted products without technological protections, and if so, at what price point, should be left to marketplace forces, and that there is no justification, at this point, for a legislative mandate on the use or non-use of technological protections in this area. Indeed, such a mandate could hamper the further development of flexible technological protection measures that respond to market demands.

ROBERT W. HOLLEYMAN, PRESIDENT AND CHIEF EXECUTIVE OFFICER, BUSINESS SOFTWARE ALLIANCE

RESPONSE TO FOLLOW-UP QUESTIONS

Question 1. Do you contend that under the “fair use” doctrine or the “right of fair use” an individual may make a “backup” copy of a CD, a DVD, or software?

Answer. Section 117 of the Copyright Act permits the making of backup copies of software. The law permits the owner of a copy to make a copy of a computer program for two specific circumstances: the copy is created either as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or for archival (backup) purposes. To guard against abuse of this provision by persons claiming to make “backup” copies when they are in fact pirating, the law prohibits any transfer of a copy made under this exception unless the original is transferred with it.

Question 2. If so, provide the legal basis for your opinion.

Answer. See answer to Question 1, and 17 U.S.C. § 117

Question 3. Do you contend that under the “fair use” doctrine or the “right of fair use” an individual may make a copy of a CD, a DVD, or software for their spouse?

Answer. The fair use doctrine does not generally permit copies of entire works. Fair use permits copying of works to be done when there is a recognized public interest purpose. Among the purposes noted in 17 U.S.C. § 107 are teaching, research,

news reporting and criticism. As noted above, section 117 of the Copyright Act does not permit a person to transfer a copy made under the exception.

Question 4. If so, provide the legal basis for your opinion.

Question 5. Do you contend that under the “fair use” doctrine or the “right of fair use” an individual may make a copy of a CD, a DVD, or software for their children?

Answer. See answers above to question #3.

Question 6. If so, provide the legal basis for your opinion.

Answer. See answers above to question #3.

Question 7. Do you contend that under the “fair use” doctrine or the “right of fair use” an individual may make a copy of a CD, a DVD, or software for any other family member?

Answer. See answers above to question #3.

Question 8. If so, provide the legal basis for your opinion.

Answer. See answers above to question #3.

Question 9. Do you contend that under the “fair use” doctrine or the “right of fair use” an individual may make a copy of a CD, a DVD, or software for a friend?

Answer. See answers above to question #3.

Question 10. If so, provide the legal basis for your opinion.

Answer. See answers above to question #3.

Question 11. Do you contend that under the “fair use” doctrine or the “right of fair use” an individual may make a copy of a CD, a DVD, or software for use in a second location, such as a car or a boat?

Answer. A second copy of a computer program can be made under the terms and conditions of Section 117 of the Copyright Act. See answer to question #1.

Question 12. If so, provide the legal basis for your opinion.

Answer. 17 U.S.C. § 117.

Question 13. If you do not believe that under the “fair use” doctrine or the “right of fair use” an individual may make a copy of a CD, a DVD, or software for any of the above named individuals or purposes, do you believe that Congress should allow by statute such copies to be made?

Answer. The law already permits certain backup copies of software. See answer to question #1.

Question 14. If so, for which individuals or purposes?

Question 15. The Home Audio Recording Act of 1992 makes it a non-infringing act to make a copy of an audio recording for personal use. If such recordings are covered by the “doctrine” or “right” of “fair use,” why did Congress explicitly have to grant that right in 1992?

Answer. The Audio Home Recording Act is not relevant to the software industry.

Question 16. If you contend the doctrine of “fair use” covers the making of a copy—for backup, family, friends, etc.—would it be a violation of “fair use” to require people to secure permission from the producer of the creative work before making a copy?

Answer. See answers to questions #1 and 3 above.

Question 17. If so, provide the legal basis for your opinion.

Question 18. Is there any device that can reliably distinguish between “fair use” and any other use? If not, wouldn’t enactment of H.R. 107 inevitably make it easier to infringe copyright even if it also made it easier to carry out some “fair uses?” Why should copyright infringement be facilitated and encouraged?

Answer. It is our understanding that devices are not now available which would be able to distinguish between copies based on an analysis of the applicable law. In particular, the availability of the fair use defense under the Copyright Act is to be done case by case based on the specific facts of the case. A device would have to be able to make determinations which are now reserved for courts. As we stated in our testimony, we believe that enactment of H.R. 107 would make it easier to infringe copyright.

Question 19. If no software or technology exists to distinguish between “fair use” and any other use, how do you propose that producers protect their rights over their creative products and protect such products from being copied multiple times?

Answer. We believe the DMCA establishes a fair balance in this regard and that further changes in the law are not needed at this time.

Question 20. If you believe that the doctrine of “fair use” gives users the right to make one backup copy, or if you believe Congress should grant such a right, would this right be satisfied if the artist or producer of the intellectual property provided two encrypted copies of a CD, DVD, or software product, neither of which could be duplicated, instead of permitting technology that allows users to make duplicate copies independently?

Answer. See answer to question #1.

Question 21. If not, why not?

Question 22. If you believe that the doctrine of "fair use" gives users the right to make multiple copies (for backup, family, friends, alternate location, etc.), or if you believe Congress should grant such a right, would this right be satisfied if the artist or producer of intellectual property provided multiple encrypted copies of a CD, DVD, or software product, none of which could be duplicated, instead of permitting technology that allows users to make duplicate copies independently?

Answer. See answer to question #1.

Question 23. If not, why not?

Question 24. If you do not believe that the "fair use" right of individuals would be satisfied if artists or producers of intellectual property provided two or more copies of the creative work to the purchaser, and instead believe that technology which circumvents encryption is the only means to secure copies under the "fair use" doctrine, provide the legal basis for your opinion.

Answer. See answer to question #1.

Question 25. Please indicate whether you would agree that this problem could be solved by the marketplace with a disclosure on CD, DVDs, and software products stating that the product may not be duplicated unless the purchaser is willing to pay a higher price for a copy of work, which can be duplicated?

Answer. Software vendors already disclose substantial information about the playability and system requirements needed to use their software. In addition, software companies disclose the DRMs they use on their works. Finally, business software products are most often licensed based on specific users needs, and priced to reflect this.

PREPARED STATEMENT OF WALTER B. MCCORMICK, JR., PRESIDENT AND CHIEF EXECUTIVE OFFICER, UNITED STATES TELECOM ASSOCIATION

Chairman Stearns, ranking member Schakowsky, and distinguished members of the subcommittee, USTA is pleased support H.R. 107, the bipartisan Digital Media Consumers' Rights Act. USTA is the premier trade association representing service providers and suppliers for the telecom industry. USTA's 1200 member companies offer a wide range of services, including local exchange, long distance, wireless, Internet and cable television services. As the voice of the converged telecommunications industry in Washington, USTA advocates for the industry's critical issues and provides a common ground where telecom carriers of all sizes and businesses can advance industry's concerns.

USTA members have long served an intermediary role in the copyright debate as providers of the Internet access and broadband services consumers enjoy and demand. Although the U.S. originally led the technology boom in the 1990s, we are now lagging far behind countries like Canada, Germany, Italy, South Korea and Japan in high-speed broadband deployment. Our consumers cannot benefit from the new "killer apps" because of the outdated regulatory burdens hindering rapid broadband deployment. Similarly, while certain content companies have made great strides in entering the new world of digital content distribution services, consumers will not fully benefit from the new era of broadband services without a balanced copyright framework in place. Consumers need assurances that they can make the same reasonable, personal uses of online works that they currently enjoy in the physical world.

Although many digital bills have recently been introduced under the auspices of benefiting the consumer, Congressman Boucher and Chairman Barton should be commended for introducing and co-sponsoring a truly pro-consumer bill. H.R. 107 ensures the public that they can enjoy personal uses of digital media and obtain the necessary warnings when a use is not permitted.

Unfortunately, the reasonable expectations of consumers for the use of new products and services in the emerging broadband world are in serious jeopardy. The balance that has always existed in copyright law has steadily eroded since the passage of the DMCA. Section 1201 of the DMCA is one of the clearest examples. Section 1201 was originally drafted to prohibit those who circumvent technological protection measures in order to infringe copyright or traffic in so-called "black boxes." The notion of "black box" has now morphed into a "black hole" of fathomless and absurd litigation. The DMCA is being misused by parties to go after competitors in ways never anticipated by Congress at time of the DMCA's enactment. Given the overly broad terms of Section 1201, litigators now enjoy a sharp sword to go after alleged "circumventers," who range from producers of robotic pet dogs, to manufacturers of universal garage door openers and refillable PC printer cartridges. The fact that this law criminalizes the act of circumvention, even when the defendant is not infringing copyright and can be exercising his or her legally protected fair use rights,

bucks against fundamental notions of common sense. As another example of DMCA distortion, who could imagine that the Recording Industry (supported by the pornography industry in their role as copyright owner) would take a narrow subpoena provision of the DMCA and use it to engage in an unsupervised digital dragnet to collect thousands of Americans' names, addresses and phone numbers using a court clerk without judicial supervision? Fortunately, the D.C. Court of Appeals, in RIAA v. Verizon, unanimously struck down this dangerous distortion of the DMCA and forced content owners to follow the proper legal process, restoring balance—at least for now—into the Copyright Act.

H.R. 107 reestablishes this critical balance in several ways. First, the bill protects consumers from deceptive practices in the labeling of copy-protected compact disks. A narrow labeling provision is neither burdensome nor offensive to basic copyright principles. It simply requires record companies to indicate on labels when CDs are copy protected and warn consumers when they will not play on certain devices, such as a personal computer. This is not a new concept. Emerging music services, such as I-Tunes, currently inform consumers of the permitted and prohibited uses of music in their terms of service. Narrow labeling of this sort is critical to prevent consumer confusion and avoid consumer backlash against new digital products and services.

As discussed above, H.R. 107 clarifies that the anti-circumvention provisions of Section 1201 make non-infringement a defense to circumvention liability. Unlike what some may say, the provision is not soft on piracy or bad for consumers. It does not say that consumers are automatically free to circumvent for a fair use purposes, but it does establish that fair use is a defense. The bill would also benefit national cyber-security and future R&D activities, by clarifying the exemption for those involved solely in furtherance of scientific research into technological protection measures. This narrow clarification removes the chilling effect that the law has imposed to date on R&D and scholarship activities from threatened and actual litigation brought under the DMCA. Finally, H.R. 107 codifies the long-established principles in the Supreme Court's Sony Betamax case by ensuring that companies that produce hardware or software products capable of significant non-infringing uses will not be subject to 1201 claims. The Betamax decision has spurred the creation of many new devices from the originally challenged VCR to the wide array of new digital devices and services consumers enjoy today. The potential chilling effect to the development of new broadband products and services would be significant if those industries faced the same threats of absurd litigation under Section 1201 as those against the universal garage door openers and PC printer cartridge manufacturers.

H.R. 107 is a welcome message from Congress that assures the digital consumer that they are not the enemy. Balanced copyright laws ultimately benefit copyright owners, consumers and the providers of the emerging technologies of tomorrow.

June 11, 2004

Via fax to (202) 225-1919

The Honorable Cliff Stearns, Chairman,
Subcommittee on Commerce, Trade and Consumer Protection
2125 Rayburn House Office Building
Washington, DC 20515

Re: Supplemental questions re H.R. 107

Dear Chairman Stearns:

I am grateful to you and the Committee for the chance to answer Congressman Shadegg's questions, as the nature of his questions demonstrates that we have done a very poor job communicating the nature and importance of H.R. 107.

Congressman Shadegg's questions focus almost exclusively on the definition of "fair use." He asks — with a litigator's persistence — a series of questions designed to map the contours of "fair use," as it applies primarily to DVDs. And while, as a professor of law, I can only admire the drama and tact of his questions, they are all beside the point of H.R. 107. More troublingly, they seem to reflect a fundamentally stunted view of "fair use."

As you know, H.R. 107 simply assures consumers their "fair use" rights *whatever those rights are*. Its aim is to guarantee that holders of intellectual property not exceed their rights over that property by deploying technical measures that block the public's "fair use" rights. Just as the owner of a house has no right to build a fence to block access to a sidewalk that runs across her land, so too the owner of intellectual property should have no right to deploy a technical protection measure that interferes with a consumer's "fair use" right. H.R. 107 secures the consumer's right to use technology to assure his or her "fair use" right, when a copyright holder uses technology to interfere with that "fair use" right.

Again, the elegance of H.R. 107 is that it doesn't purport to define "fair use" (the fortuity of the bill number notwithstanding). Instead, it simply exempts from the scope of the anti-circumvention provisions of the DMCA any technology that secures a "noninfringing use" of a work. Those "noninfringing uses" are, of course, many. Yet Congressman Shadegg's questions, and many questions at the Hearing, seemed to assume that there was only one relevant "noninfringing use": the right to make multiple copies of a copyrighted DVD.

If consumers have such a "fair use" right (which, under certain circumstances, I believe they do), then that right is certainly among the *least important* "fair use" rights that H.R. 107 would secure. Far more important would be the right of consumers to control which part of a movie their children see; or the right of a business to build competitive interoperating technologies; or the right of researchers to circumvent protection measures to study or criticize technologies; or the right of consumers to space shift content to a more convenient or useful technology; or the right of businesses (such as Sony, or Apple) to develop technologies to facilitate that space shifting; or the right of the owner of a computer running the GNU/Linux operating system to play a DVD on his machine; or the right of the owner of a robotic dog to tinker with his property to teach it new tricks; or the right of a student to incorporate a section of a film in a critical essay or project about film making. All of these examples are drawn from actual conflicts that have arisen under the DMCA; all would constitute, I believe, "noninfringing uses" of copyrighted work; all of these noninfringing uses should, in my view, be allowed; none are affected by the right of a consumer to make multiple verbatim copies of copyrighted content.

Moreover, there is a flavor to these questions, as well as to many of the questions at the Hearing, which suggests that a respect for "property rights" requires allowing content owners to defeat "fair use" rights. This too is a profoundly misguided view. Indeed, a respect for property rights counsels precisely the opposite conclusion. When lawyers from the Sony Corporation threatened a DMCA prosecution against the owner of a Sony Aibo dog for publishing on his web site a technique to teach the dog to do new tricks, it was Sony that was interfering with the property rights of the Aibo dog owner. He had, after all, paid over \$1,500 for the dog he was tinkering with. They were attempting to deny him the right to do with his robotic dog as he wished. There is no reason Congress should permit content owners to so limit the property rights of consumers.

More generally, there was a suggestion at the Hearing that, respecting the limits of "fair use," and blocking the power of property owners to interfere with "fair use," was a limit particular to intellectual property rights. That too is a mistaken view. H.R. 107 merely extends to intellectual property *the same rule that applies to real property*. The law has long recognized that a real property owner has no right to use technology to interfere with a public easement right.¹ H.R. 107 extends this century old principle to intellectual property law: It says that *if* a use is a "noninfringing use," *then* a technology designed to secure it does not infringe the DMCA. Importantly, the converse also applies: *If* a use is *not* a "fair" or "noninfringing" use, *then* a

¹ See *Ploof v. Putnam*, 81 Vt. 471 (1908); *Vincent v. Lake Erie Transportation Co.*, 109 Minn. 456 (1910). As Professor William Fisher has described this in his forthcoming book, "The general principle latent in [these] decision[s] is that the exceptions that the law carves out of a landowner's right to exclude curtail, not only his ability to call upon the courts and the police to expel intruders, but also his privilege to employ his own efforts to halt or prevent intrusions." WILLIAM FISHER, PROMISES TO KEEP (Stanford University Press, 2004).

technology designed to secure it, by circumventing a technological protection measure, would *still violate* the DMCA.

Congressman Shadegg's focus upon the uncertainty of the application of "fair use" is indeed a worthy inquiry, though I would suggest in a different context. As his questions suggest, the line that "fair use" draws is an uncertain one. For businesses that rely upon that line, that uncertainty imposes an inefficient and unproductive cost.

For example, whether a VCR was an infringing technology was a question that took eight years for the federal courts to resolve. During those eight years, there were, no doubt, many businesses that chose not to develop VCR technology because of that legal uncertainty. The same uncertainty has plagued the modern digital equivalents of the VCR — the digital video recorder. Though many believed (rightly in my view) that the reasoning of the Supreme Court in *Sony v. Universal*, 464 U.S. 417 (1984), applied as directly to DVRs as VCRs, one of the early innovators in DVRs, ReplayTV, was forced to defend its technology for many months in a federal court, until the burden of that defense forced it to settle and reorganize. This is another example of how the uncertainty of "fair use" has burdened commercial innovation.

This burden on commercial innovation is a product of the complexity of the "fair use" test. And it was for that reason that my original testimony suggested that Congress, at another time, consider how best to clarify the doctrine of "fair use," so that it might better guide businesses and consumers. As I suggested, given the massive change that digital technology has effected, it would be appropriate for Congress to consider charging a commission with the task of considering the effect of digital technology upon copyright regulation. And again, in my view, there could be no one better than former-Congressman Kastenmeier to guide the work of that Commission.

But again, the scope of "fair use" is not affected by H.R. 107. And it would be misleading, in my view, for the record of this Committee to suggest that its deliberations were attempting to resolve what "fair use" would be in any particular context.

There is a final way in which Congressman Shadegg's questions seem to miss the point of H.R. 107, and, again, my testimony before your Committee was not adequate in making this point clear.

The thrust of Congressman Shadegg's questions presume that a "backup" copy of, for example, a DVD, would be used simply as a substitute for a second DVD purchase. That is, in my view, a misperception. To the extent a "backup" is nothing more than a substitute for a second (or third or fourth) purchase, then I don't believe there is any strong "fair use" claim in favor of a right to make such a "backup." But by a "backup," one ordinarily means something different from "a second copy." Its primary meaning is the capacity to recover a program or content if the original is lost or damaged. As software makers have long recognized, giving the consumer this right increases the value of the software sold, because the replacement costs — even assuming the replacement software was free — can be extremely high.

For example, on my Macintosh, I have at least 187 application programs, in addition to the operating system, OS X. I regularly backup my computer — thus producing 187 copies of these application programs, as well as a copy of my operating system. I do this so that *when* my

hard disk crashes (for eventually, all do), or if my computer is lost, I have a ready replacement. And because I have a ready replacement, the value of my computer to me is much greater.

We could imagine a world where the software forbids me from making a backup, and where the law made it a felony to make software designed to evade that restriction. In that world, even if software manufacturers gave consumers free replacements for lost software, the cost of replacing a computer would be astronomical: The 187 applications I have come from at least 100 different vendors. Even assuming I had kept physical records of all the programs I purchased, the costs of contacting those vendors to request a replacement would destroy much of the value of the computer.

The same point is true about DVDs. Congressman Shadegg's questions presume 20th century technology: A world where a consumer simply inserts a single DVD into a machine, and plays it. In that world, he is, with good reason, skeptical about whether there is a "fair use" right to "backup" a DVD. If all DVD manufacturers gave away replacement DVDs at cost (as Disney testified it does), then there would be little reason to find a "fair use" right to make a copy of a DVD.

But this is a very restrictive view about the technologies for viewing DVD content. And here, the image that Congressman Doolittle suggested with his iPod is instructive.

In a very short period of time, iPod-like technologies will enable consumers to keep not only their music collection on a small portable device, but also their movie collection. Consumers could then carry with them the full range of content that they have purchased, enabling, for example, a business traveler to plug his or her iPod into a hotel TV, and watch movies he or she purchased, as well as listen to his or her music. These technologies will vastly increase the value of the original DVDs — as the wider range of uses will make the content more valuable to consumers. And these technologies will drive significant growth in the technology sector, as companies compete to deploy faster, cheaper, movie-carrying technologies.

Another example would be video-jukebox technology, which is currently being sold in some markets, but which faces significant legal uncertainty in America. These technologies would enable consumers, once they buy a DVD, to shift its content to a single hard disk that could be accessed anywhere in a home. The original DVD could then be stored as the "backup," assuring consumers that when the hard disk failed, they would not lose access to their content. Without that assurance, many consumers would not be willing to risk shifting their content to jukebox technology; with that assurance, the jukebox market will grow quickly.

It is against the background of these technologies that one should evaluate the "fair use" of a technology that would enable a copy of DVD content. Against the background of these technologies, I am confident that a court would find that a consumer had a "fair use" right to make a copy of the original DVD.

I can well understand why some in the content industry would still want to oppose such uses. The content industry has a long history opposing new technologies that it can't perfectly monetize or control. Opposition to VCRs was grounded upon the view of some within the film industry that it should earn a financial benefit each time a copy of its content was made; the same view drove many in the music industry to oppose technologies that enabled home-taping of recorded content.

But Congress has long recognized that perfect control over the uses of copyrighted content has never been the objective of copyright law, *Sony v. Universal*, 464 U.S. 417, 432 (1984) (copyright “protection has never accorded the copyright owner complete control over all possible uses of his work.”), and that less than perfect control has actually driven growth in industries that are far more valuable to the American economy than the content industry alone. As Congress represents all American industry, and consumers, and not just the content industry, it has often recognized a “fair use” right even when a commercial alternative was feasible.

In my view, Congress’ objective should be to set rules that will benefit commercial innovation and consumers generally. It should not set rules designed to protect a single industry against the competition new technologies might present. Historically, in my view, Congress has served this pro-growth objective reasonably. My strong concern is that latent in Congressman Shadegg’s questions is a desire to reverse this history, and destroy this potential for economic growth.

In the balance of this letter, I address, as best as I can, Congressman Shadegg’s specific questions. I am hopeful that this introduction will make the justification for my answers more transparent.

- 1. Do you contend that: under the “fair use” doctrine or the “right of fair use” an individual may make a “backup” copy of a CD, a DVD, or software?**

Yes.

- 2. If so, provide the legal basis for your opinion.**

With respect to a music CD, the right is explicitly secured by the Audio Home Recording Act, 17 U.S.C. § 1001; the “home taping exemption” is at 17 U.S.C. § 1008. See *Recording Industry Association of America v. Diamond Multimedia Systems*, 180 F.3d 1072, 1079 (9th Cir.1999). Indeed, as Judge Posner suggested in *In re Aimster Copyright Litig.*, 334 F.3d 643, 652-3 (7th Cir. 2003), there may even be a “fair use” right to make a copy of another person’s CD content, if the party making the copy had already purchased the content being copied, and the content was then only provided to parties who had proven that they had also purchased the content.

With respect to software, if the software is “owned,” the right is protected by 17 U.S.C. 117(a). See *U.S. v. Elcom, Ltd.*, 203 F. Supp. 2d 1111, 1135 (N.D. Cal. 2002), citing *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 267 (5th Cir.1988). If the software is just licensed, then in my view the same right would exist, but I know of no authority resolving the question finally.

With respect to a DVD, the same reasoning that guided Congress in the AHRA would, in my view, guide a court to conclude that a “backup” is “fair use.” As I have explained, however, a “backup” is different from a second (or third) copy. The purpose of a “backup” is to secure access to the content if primary access to the content is lost.

- 3. Do you contend that under the “fair use” doctrine or the “right of fair use” an individual may make a copy of a CD, a DVD, or software for their spouse?**

Depending upon the technology, yes.

4. If so, provide the legal basis for your opinion.

Again, with respect to a CD, the right is explicitly protected by the AHRA.

With respect to software, or a DVD, the “fair use” right would depend upon the technology. If, for example, the technology is a home computer, and the computer has a number of users, each with their own profile, I would predict that a court would conclude that a “copy” made so that each user of the computer could use the same program on a single machine would constitute “fair use.”

With respect to a DVD, again, the “fair use” right would depend upon the technology. If the copy were made, for example, to a video-jukebox, so that anyone watching television within a house could view that DVD, then that copy would be “fair use.”

5. Do you contend that under the “fair use” doctrine or the “right of fair use” an individual may make a copy of a CD, a DVD, or software for their children?

Yes, under the reasoning of question #3.

6. If so, provide the legal basis for your opinion.

See #4.

7. Do you contend that under the “fair use” doctrine or the “right of fair use” an individual may make a copy of a CD, a DVD, or software for any other family member?

Yes, under the reasoning of question #3.

8. If so, provide the legal basis for your opinion.

See #4.

9. Do you contend that under the “fair use” doctrine or the “right of fair use” an individual may make a copy of a CD, a DVD, or software for a friend?

No.

10. If so, provide the legal basis for your opinion.

NA.

11. Do you contend that under the “fair use” doctrine or the “right of fair use” an individual may make a copy of a CD, a DVD, or software for use in a second location, such as a car or boat?

Yes, under the reasoning of question #3.

12. If so, provide the legal basis for your opinion.

If the copy enables “space shifting” — such as copying a CD to an iPod — I don’t believe there is any copyright-related interest or reason in forbidding its use at a second location, such as a car or boat. Indeed, the value of an iPod is that it could be used in any number of places, and that value in turn increases the value of the underlying content.

- 13. If you do not believe that under the “fair use” doctrine or the “right of fair use” an individual may make a copy of a CD, a DVD, or software for any of the above named individuals or purposes, do you believe that Congress should allow by statute such copies to be made?**

As I believe the “fair use” right is an inefficient mechanism to protect user rights, and protect the commercial interest in building upon those rights, I believe that in every case in which Congress might, it would benefit consumers and innovators if it explicitly recognized a right as a fair use right. The doctrine of “fair use” might usefully continue to suggest the evolution of a balance between rights and public access. But where clarity is possible, Congress should provide clarity.

- 14. If so, for which individuals or purposes?**

In my view, the individuals most clearly benefited by clear rules of “fair use” are the commercial entities that build businesses upon the freedom secured by clear rules of “fair use.” The burden of threatened litigation has chilled a great deal of innovation in Silicon Valley in the past ten years — precisely because permissible uses of copyrighted content were unclear. If that uncertainty had been removed, there would have been a substantial benefit to business and, in turn, consumers. Copyright law is an especially burdensome form of federal regulation; reducing the uncertainty of that regulation increases the opportunity for commercial growth.

- 15. The Home Audio Recording Act of 1992 makes it a noninfringing act to make a copy of an audio recording for personal use. If such recordings are covered by the “doctrine” or “right” of “fair use,” why did Congress explicitly have to grant that right in 1992?**

Congress explicitly recognized a personal use right in 1992 because it saw the benefit to the industry as a whole from freer use of content. That is consistent with the ultimate question asked by the fair use analysis. But even if, properly applied, “fair use” would have yielded the same ultimate answer, as I have already indicated, there is a great benefit if Congress can clarify the matter upfront. Because Congress clarified the question, businesses making devices to enable home-taping could develop their technology with a clear view of the law. The AHRA also addressed duties necessary to compensate artists for uncompensated recordings. That was beyond the scope of any fair use right.

- 16. If you contend the doctrine of “fair use” covers the making of a copy - for backup, family, friends, etc... - would it be a violation of “fair use” to require people to secure permission from the producer of the creative work before making the copy?**

Yes.

- 17. If so, provide the legal basis for your opinion.**

The change suggested in question #16 would be a radical transformation in the doctrine of “fair use,” undermining much of its social value. The whole point of “fair use” is to grant permissions where an author otherwise would or could not. A reviewer, for example, has a “fair use” right to copy sections of a book in his review of that book. If the reviewer had to get

permission before he could write such a review, no doubt fewer critical reviews would be written. That may benefit an individual author (of, for example, a bad book). But it would harm book sales generally, as readers would not be able to rely upon reviews being accurate.

- 18. Is there any device that can reliably distinguish between “fair use” and any other use? If not, wouldn’t enactment of H.R. 107 inevitably make it easier to infringe copyright even if it also made it easier to carry out some “fair uses?” Why should copyright infringement be facilitated and encouraged?**

H.R. 107 would make it easier for law-abiding citizens to enjoy their fair use rights, and for businesses to build products around those rights. No doubt, it would also make it easier for law-violating citizens to violate copyrights. Yet I don’t know of a context in which we remove from law-abiding citizens constitutionally protected rights (as “fair use” is) just because there are others who would violate statutorily protected rights.

There is no constitutional obligation of Congress to grant copyrights at all. There is a constitutional obligation to secure “fair use” if copyrights are granted. In my view, it turns the meaning of the Constitution on its head to say that Congress can sacrifice what it must constitutionally provide to protect what it need not constitutionally secure.

- 19. If no software or technology exists to distinguish between “fair use” and any other use, how do you propose that producers protect their rights over their creative products and protect such products from being copied multiple times?**

Copyright law protects copyright owners against infringing uses. No one is proposing a change in that rule. That rule has been used to impose substantial penalties on a wide range of copyright infringement; those penalties create a strong incentive to obey the law. In my view, Congress should not change a fundamentally American principle: that we punish the guilty for their crimes, rather than punishing the innocent so the guilty find it harder to commit their crimes.

- 20. If you believe that the doctrine of “fair use” gives users the right to make one backup copy, or if you believe Congress should grant such a right, would this right be satisfied if the artist or producer of the intellectual property provided two encrypted copies of a CD, DVD, or software product, neither of which could be duplicated, instead of permitting technology that allows users to make duplicate copies independently?**

No.

- 21. If not, why not?**

Again, the question focuses on the non-transformative use of copyrighted material, ignoring the core of “fair use” — transformative uses. As I have said, if there is a “fair use” right to make a backup, it is among the least important of “fair use” rights. To craft a rule that protected just it would be to defeat the most important elements of “fair use.”

The rule would also defeat the most important commerce-supporting aspects of “fair use.” Had this rule been applied to CDs, then the iPod would not have been possible. Does anyone believe the music industry would be better off if the iPod were a criminal technology?

- 22. If you believe that the doctrine of “fair use” gives users the right to make multiple copies (for backup, family, friends, alternate location, etc...), or if you believe Congress should grant such a right, would this right be satisfied if the artist or producer of intellectual property provided multiple encrypted copies of a CD, DVD, or software product, none of which could be duplicated, instead of permitting technology that allows users to make duplicate copies independently?**

No.

- 23. If not, why not?**

Again, I believe, for example, that there is a “fair use” right to space-shift my music — from a CD, to my iPod, to my computer, to my car. Giving me four CDs would not satisfy that right. Such reasoning again would have made it impossible to sell an iPod.

- 24. If you do not believe that the “fair use” right of individuals would be satisfied if artists or producers of intellectual property provided two or more copies of the creative work to the purchaser, and instead believe that technology which circumvents encryption is the only means to secure copies under the “fair use” doctrine, provide the legal basis for your opinion.**

The question again assumes a stunted view of the value of “fair use” — a view that has, I suggest, no support in any judicial opinion, or in the statutes of Congress. If there is a “fair use” value in a consumer making “two or more copies of the creative work,” it is among the least important of the “fair use” values. To reduce “fair use” to just this right would be to cripple the doctrine. More significantly, it would, in my view, raise significant constitutional problems. *Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (slip op. at 29, 30) (2003).

- 25. Please indicate whether you would agree that this problem could be solved by the marketplace with a disclosure on CDs, DVDs, and software products stating that the product may not be duplicated unless the purchaser is willing to pay a higher price for a copy of the work which can be duplicated?**

If by “this problem,” the question means the restriction of any “fair use” right to make multiple copies of copyrighted content, then yes, “this problem” would be solved by the regulation proposed. But even if that “problem” were solved, there would remain strong reason for H.R. 107 — for again, the right to make multiple copies, if there is such a right, is neither the most important nor most threatened “fair use” right.

Put differently, in my view Congress could adopt H.R. 107, but define “fair use” to exclude the right to make multiple copies of copyrighted content. I doubt such a restriction on the

scope of “fair use” would raise significant constitutional questions. But there would remain a wide range of noninfringing uses that would nonetheless be protected by H.R. 107.

If there are further questions I can answer, I would be happy to clarify or supplement this submission.

With kind regards,

Lawrence Lessig

June 10, 2004

The Honorable Cliff Stearns
Chairman
Subcommittee on Commerce, Trade,
and Consumer Protection
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Stearns:

The undersigned thank you for the opportunity to testify before the Subcommittee on Commerce, Trade and Consumer Protection on H.R. 107, "The Digital Media Consumers' Rights Act of 2003," (DMCRA). We hope that our testimony provided the Subcommittee with useful information about the balance between the rights of citizens and copyright holders that H.R.107 seeks to preserve.

Our letter today is in response to Representative John Shadegg's follow-up questions, dated May 27, 2004, which concern the application of the "fair use" doctrine to a number of specific examples. We submit this letter for the record to respond to those questions and to explain H.R.107's role in bridging the gap between traditional copyright principles and the goals of the Digital Millennium Copyright Act (DMCA).

At the outset, we note that we are answering Representative Shadegg's questions generally rather than specifically. We do so to underscore the important point that in the American copyright system, only courts can determine whether particular uses are fair ones, based on all the facts and circumstances. Predictions of how courts might rule in generalized hypothetical cases have little or no reliability, especially since the copyright law recognizes the possibility of lawful uses that have not yet been ruled upon. Fair use is a principle that must be judicially validated in specific cases, but this dynamic doctrine is more than the total of the precedents that have gone before.

There is no better-known example of this than the Supreme Court's 1984 decision in *Sony Corporation of America v. Universal City Studios*, which determined that individuals' "time-shifting" of television programming through the use of videocassette recorders qualified as a kind of fair use. In that case, the Supreme Court did not rely on the "legal authority" of previous decisions regarding VCRs; instead the Court relied on the more general balancing principles that underlie the fair-use doctrine. The application of such principles is fact-based and situation-based, which makes it impossible for us to predict with any certainty what the answers to Representative Shadegg's questions might be.

If we can't provide reliable answers to those questions, one may ask how the courts can apply fair use in practice. Part of the answer is that courts faced with fair-use

issues have the benefit of a full record when they make these highly situation-specific determinations. The other is that any ruling on fair uses depends on the following first principles:

Copyright in the United States is built on a balance of the incentive to create and the dissemination of knowledge. At the axis of this balance, courts and Congress have developed the doctrine of fair use. Fair use exists because, as a society, we value access to information along with the rights of creators. Because it is an elusive and even amorphous concept, Congress codified the fair use doctrine in Title 17, Section 107, to provide courts with a test to apply on a case-by-case basis that includes (but is not limited to) the following four factors:

- The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- The nature of the copyrighted work;
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- The effect of the use upon the potential market for or value of the copyrighted work.

One of the clear conclusions that can be drawn from these first principles is this: fair use sometimes allows citizens to copy from protected works without the permission of the copyright owner. Courts have been especially willing to recognize this right to copy where the new use adds value to the material copied, or where it is undertaken only for personal, non-commercial purposes. Obviously, fair use benefits information consumers. It also creates the opportunity for innovative companies to empower citizens by providing them the technological tools needed to make fair-use copies. Moreover, history has shown that citizens' fair-use rights and the associated freedom to innovate have created entirely new markets to the benefit of innovators and copyright holders, as well as the public at large.

The fair-use doctrine – properly understood as a system of balancing principles – is an essential part of the American copyright system. There is much room for argument about how broadly or narrowly it should be applied in specific cases. However, Congress need not determine the specific parameters of the fair-use doctrine in order to evaluate H.R. 107, as it will continue to evolve in the courts. By its own terms, H.R. 107 does nothing to alter the fair-use doctrine. Instead, H.R. 107 simply provides that fair use applies to protected digital works just as it does to all other copyrighted material, regardless of format.

In the digital world, the DMCA makes it illegal for a citizen to circumvent a digital work's technological locks – even if the intended use would not be judged by a court to be copyright infringement. In effect, the DMCA as it stands today gives the creator of a digital work protection beyond traditional copyright – including protection from the lawful copying that may be necessary for criticism, comment, news reporting, and research. H.R.107 is designed to restore these time-tested limitations on copyright. At the same time, H.R. 107 maintains the DMCA's prohibitions on circumvention of digital protections for copyrighted works when the underlying purpose of that circumvention is unlawful.

This balance of objectives explains why we support the DMCRA. H.R.107 was thoughtfully written so as not to interfere in any way with a copyright holder's use of technological measures to protect against infringement. H.R.107 is not pro-“hacking” or pro-infringement, nor does it create a market for technological tools whose purpose is to infringe copyrights. Under the DMCRA, whenever a court finds that a particular use accomplished through circumvention was an infringement, the penalties provided by both the DMCA and traditional copyright infringement law would continue to apply with full force. Should a court find circumvention of a technological lock was for legitimate purposes of research, criticism, and the like, there would be no infringement and therefore no DMCA violation. Thus, H.R. 107 would continue to discourage and punish unlawful hacking and other forms of circumvention, while securing the traditional use rights that American copyright law affords to all our citizens

Thank you.

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321 Responses to Follow-up Questions to May 12, 2004 Hearing H.R. 107,
 “The Digital Media Consumers Rights Act of 2003”
 from the Subcommittee on Commerce, Trade, & Consumer Protection
 U.S. House of Representatives

Questions 1–14: The Nature and Scope of Fair Use

On April 22, 2002, 321 Studios filed a Request for Declaratory Ruling (“Request”) with the U.S. District Court for the Northern District of California. It voluntarily took this unusual step because no court had at that time (or, for that matter, has yet) determined whether the selling of software designed to enable consumers to “backup” copies of an encrypted, copyrighted DVD under the venerable common law doctrine of “fair use” (codified in 1976 at Section 107 of Title 17 of the United States Code [the “Copyright Act”]), and/or Section 117 of the Copyright Act, which along with all statutory limitations (Sections 107-122) are incorporated into the of the Digital Millennium Copyright Act (“DMCA”) by Section 1201(c).

Clearly, in seeking such a ruling nearly half a year before any claims were formally brought against it under the DMCA, 321 Studios believed in good faith that the California Court, *in a case of first impression*, should and would find that a consumer’s private copying of a DVD for archival purposes, for use in multiple locations (sometimes called “space-shifting”), and other legitimate, fair use purposes fell within the parameters of Sections 107 and 117 and thus exceptions to Section 1201. As in all cases involving allegations of DMCA and copyright infringement, 321 Studios called upon the court, *inter alia*, to undertake the fair use analysis for determining whether 321 Studios software products were used for substantially non-infringing purposes and whether consumers making backups of lawfully acquired DVDs is “fair” and thus, by definition, not an infringement of copyright. It also argued that absent a clear statement on the inclusion of fair use within the DMCA, the anti-circumvention rules would not be grounded properly in constitutional principles of free speech or the “limited times” requirement of the copyright clause.

A complete copy of 321 Studio’s brief in Opposition to the Defendants Hollywood Studios’ Motion for Summary Judgment in the California case, setting

321 Responses to Follow Up Questions
Hearing on H.R. 107
June 10, 2004
Page 2 of 6

forth its own analysis of the statutory factors and citing germane authority, is attached. It is critical, however, that the Subcommittee understand that – although the fair use doctrine was part of American common law for over 100 years before being codified – only a relative paucity of actual decisions have been handed down and that no case previously directly addressed the facts presented by 321 Studio's technology and DVDs. This is due, in large measure, to the fact that fair use generally only comes before a court when raised as an affirmative defense to a lawsuit filed for copyright infringement. It is the rare case in which a defendant, often an individual, has the resources to actually litigate (rather than settle) such a claim generally brought by an institutional plaintiff with substantial corporate wealth.

Accordingly, 321 Studios was particularly disappointed when, as emphasized in Robert Moore's recent testimony before the Subcommittee, the District Court did not reach the case-by-case fair use analysis compelled by 17 USC §§1201(c) and 107, ruling instead that the DMCA's "anti-circumvention" stricture rendered that very same law's fair use "savings clause" essentially irrelevant. That is precisely the "Catch-22" that 321 Studios now seeks the Subcommittee's and Congress' help in resolving for itself and the American consumer.

In sum, 321 Studios does believe that – consistent with the Supreme Court's ruling in *Sony Corporation of America vs. Universal Studios, Inc.*, 464 U.S. 417 (1984) (*Sony*) discussed at length before the Subcommittee – consumers do have the right to employ 321 Studios DVD copying software for archival, "space-shifting" and other fair purposes. 321 Studios does not presume, however, to know how and where a court will draw all the fine lines artfully articulated in Congressman Shadegg's serial inquiries. Rather, 321 Studios simply and respectfully maintains that passage of H.R. 107 is unfortunately necessary to compel the judiciary to ascribe meaning to the DMCA's fair use savings clause by actually undertaking the four factor fair use analysis delineated at Section 107 of the Copyright Act and applying the other copyright limitations (Sections 108-122).

Questions 15 – 19: The Nature of Fair Use and the Impact of Technology

Prior to responding to questions 15-19, 321 Studios believes it important to correct what may be misconceptions regarding the nature of the fair use doctrine and its codified place in American copyright law (both case law and statute) implicit in the form of the questions. In brief, Title 17 of the U.S. Code was overhauled in 1976 and subsequently modified over the years for the express

321 Responses to Follow Up Questions
Hearing on H.R. 107
June 10, 2004
Page 3 of 6

purpose of embodying a conscious balance under law between affording copyright holders broad – but not total – control over their works (often referred to as a “bundle of rights”) and providing the public with significant exceptions to those rights.

The “bundle of rights” is codified at §106 of the Copyright Act, while exceptions for many specific purposes appear in Sections 107-122. In every case under existing copyright law, by design, consumers of copyrighted information may exercise the privileges and rights afforded by these exceptions without the prior permission (indeed, any approval at any time) of the copyright owner. Section 117, for example, categorically permits consumers to make an archival copy of a computer program (defined in Section 101 of the Copyright Act). Section 108 enables libraries and archives to perform valuable public copying and preservation functions and Section 109, which codified the long-standing judicial “first sale doctrine,” allows a library, video rental store or an individual to further redistribute a lawfully acquired copy of a copyrighted work. Indeed, such further distribution may even be for profit – all without the original copyright owner’s consent.

The fair use doctrine, codified in 1976 as Section 107 of the Copyright Act, is structured differently in that it deliberately does not delineate a bright-line definition of permissible conduct, but instead affords a defense to a claim of copyright infringement based on statutory criteria. This flexibility, embodied in the four factor test set forth in Section 107, was deliberately maintained when the fair use doctrine was codified to allow precisely for the kind of technological evolution that has driven the shape and form of copyright law literally for centuries (e.g., Gutenberg’s press, Edison’s sound and motion recorders, and more recently digital devices of all kinds).

It cannot be overemphasized, as scholars long have observed (and both Professor Lessig and Mr. Shapiro eloquently testified last month), that it is precisely this delicately struck equivalence in American copyright law between copyright owner’s rights to control certain uses of their works for limited times and the exceptions to those rights that has been a necessary accommodation to free speech, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (*Eldred*), and that has made this country the great technological innovator that we historically have been and remain. Lose that balance and, without exaggeration, we run afoul of our core constitutional principles and we lose that edge and the tremendous economic engine it represents.

321 Responses to Follow Up Questions
Hearing on H.R. 107
June 10, 2004
Page 4 of 6

Accordingly, in considering the specific questions posed by Mr. Shadegg addressed in this section and by H.R. 107 itself, 321 respectfully urges the Subcommittee to bear in mind that the purpose of American copyright law is not now and has never been *solely* to protect copyright holders. Rather, it is to protect the difficult, but critical balance described above. Indeed, consistent with that long tradition, that is precisely what Congress sought to do in the DMCA when it both provided protection for copyright owners against circumvention *and* expressly affirmed that in so doing it did not intend to curtail or limit either fair use or the many other consumer exceptions reflected in Title 17, nor did it intend to extend the term of copyright protection.

With this essential predicate, 321 Studios offers the following specific replies to Mr. Shadegg's inquiries:

Q. 15: The Audio Home Recording Act ("AHRA") was passed in direct response to technological innovation, the advent of digital audio tape, perceived at the time by the recording industry as a grave threat to its survival. By its terms, it was intended to be a supplement to basic structure of the then-existing copyright law described above: copyright owners rights enumerate at Section 106 circumscribed by multiple exceptions.

The personal copying "right" granted by the Act thus was not created by it. Rather, it was affirmed as an open quid pro quo for the "levy" placed by the legislation on the sale of every blank digital audio tape to compensate the recording industry for "piracy" that the industry argued hypothetically that the new technology would facilitate.

It is relevant to note that 321 Studios repeatedly has offered to negotiate and adopt a model similar to that codified in the AHRA, but DVD copyright holders consistently have refused to even begin such discussions. Indeed, offers by 321 Studios to make such royalty payments retroactive (potentially yielding millions in revenue to Hollywood interests) consistently have been summarily rejected.

Q. 16 and 17: For the reasons detailed above, requiring the advance permission of a copyright holder in order to make "fair use" of a work would be antithetical to both the historical underpinnings of the doctrine and Congress' rationale for codifying it in 1976. Such a requirement literally also could endanger the constitutionality of all of Title 17 which, as many scholars have noted, exists in

321 Responses to Follow Up Questions
Hearing on H.R. 107
June 10, 2004
Page 5 of 6

legal tension with the First Amendment. *See Eldred; Dastar v. Twentieth Century Fox Film Co.*, 123 S. Ct. 2031 (2003). Consider, for example, the implications for political discourse or investigative journalism of a campaign analyst or journalist needing the advance permission of a speech's author to quote from it in a critical analysis.

Q. 18 and 19: As an intentionally subjective, case-by-case analysis deliberately left by statute to the courts, fair use determinations are unlikely to be successfully automated. In making just such an assessment, as 321 Studios and others testified before the Subcommittee, the Supreme Court found in *Sony* that the new video recording device *could*, in fact, be used to infringe the copyrights of the movie studios that sought to prohibit its manufacture and distribution. Because, however, the device also was capable of "substantial non-infringing uses" and facilitated consumer's fair use of copyrighted programming, the Court found that the product should not be banned.

In so holding, the Court observed and relied upon the fact that copyright holders are empowered in many ways by copyright law (even more so today) to aggressively find, sue and even seek the criminal prosecution of those who do infringe copyright. In other words, the Court did not view the Copyright Act solely or predominantly as a vehicle for perfecting a "watertight" system of property control for the benefit of copyright owners. Critically, it understood, embraced and affirmed that the balance in law discussed at length above is the law's true and proper function.

Viewed through that "end of the telescope," 321 Studios respectfully suggests that consumers are entitled to the judicial determination of the parameters of fair use regarding DVD copying voluntarily sought by 321 Studios, but ignored by the trial court, despite being affirmatively preserved in the DMCA. That is the analysis, without presupposing a given result, that H.R. 107 regrettably is now needed to compel.

Questions 20 – 25: Suggested Statutory Modifications or Negotiated Solutions

321 Studios wishes to underscore that it neither seeks, nor would consider desirable, ossification of the fair use doctrine by modifying existing law to decree a set number of copies of a DVD to be permissible under fair use. Rather, 321 Studios strongly supports H.R. 107 as a means of requiring the judiciary to perform

321 Responses to Follow Up Questions
Hearing on H.R. 107
June 10, 2004
Page 6 of 6

its historical obligation to assess fair use in the face of new technologies as circumstances arise. For the same reasons, 321 Studios also would not recommend to the Subcommittee that the holders of copyright in DVDs be enabled or authorized unilaterally to declare a set number of backup copies and/or copies made for use in particular settings to constitute "fair use" as a legal matter. Should they elect to do so, however, as a means of demonstrating their "consumer-friendly" nature, 321 Studios certainly would not protest.

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 10 SAN FRANCISCO DIVISION
 11
 12 321 STUDIOS, Plaintiff,
 13 v.
 14 METRO-GOLDWYN-MAYER STUDIOS
 15 INC., et al., Defendants,
 16
 17 METRO-GOLDWYN-MAYER STUDIOS
 18 INC., et al., Counterclaimants,
 19 v.
 20 321 STUDIOS, ROBERT MOORE, ROBERT
 21 SEMAAN, and VICTOR MATTISON,
 22 Counterclaim Defendants.
 23

**Case No. C 02-1955 SI
[E-Filing]**
**321 STUDIOS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANTS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT**
Date: April 25, 2003
Time: 9:00 A.M.
Dept: Courtroom 10, 19th Floor
Judge: The Honorable Susan Illston

TABLE OF CONTENTS

	<u>Page</u>	
I.	INTRODUCTION	1
II.	SUMMARY OF RELEVANT FACTS	1
A.	DVDs Are The Movie Industry's Leading Format For The Distribution Of Films	1
B.	DVDs Are Susceptible To Damage, Scratching And Deterioration.....	2
C.	CSS Is Used To Encode The Data On Certain DVDs Distributed By The Studios	2
D.	CSS Does Not Necessarily Correspond With Copyright Protection Of The DVD Contents	3
E.	DVD Copy Plus Consists Of Publicly Available Software And An Instruction Guide That Permits Legitimate Owners Of DVDs To Create Backup Copies	3
F.	DVD X Copy Can Make An Archival Backup Copy Of A DVD Or To Restore Data That Cannot Otherwise Be Retrieved From Damaged DVDs	4
G.	DVD Copy Code Is Not An Instrument Of Piracy	4
III.	LEGAL ANALYSIS.....	7
A.	DVD Copy Code Is Not Prohibited Under The DMCA	7
1.	DVD Copy Code Does Not "Circumvent" Encryption	8
a.	321 Does Not Violate Section 1201(a)(2)	8
2.	321 Does Not Violate Section 1201(b).....	9
a.	Section 117 Of The Copyright Act Allows Users To Make Archival Copies	10
b.	Making An Archival Backup Copy Is A Fair Use Under Section 107.....	11
c.	Because The Primary And Intended Use Of 321's Software Is Legal, 321 Does Not Violate Section 1201(B)	13
(i)	Fair Use Is A Common Law Defense To The DMCA.....	13

-i-

1	(ii)	Section 1201(B) Explicitly Preserves Fair Use As A Limitation	13
2	(iii)	DVD Copy Code Does Not Interfere With A Right Of A Copyright Holder	14
3	(iv)	DVD Copy Code Does Not “Circumvent” Encryption.....	16
4			
5	3.	321 Does Not Violate Any Of The Three Statutory Prongs Of Either Section.....	18
6	a.	DVD Copy Code Is Not Primarily Designed Or Produced To Circumvent	18
7	b.	DVD Copy Code Does Not Have Only Limited Commercially Significant Purposes Other Than To Circumvent.....	18
8	c.	A Prohibition On Truthful Marketing Violates The First Amendment.....	19
9			
10	B.	As Construed By The Studios, The DMCA Violates The First Amendment.....	19
11	1.	A Ban on DVD Copy Code Impermissibly Burdens The First Amendment Rights of Users.....	20
12	(i)	Users Have A First Amendment Right To Make Fair Use Of Copyrighted Works.....	20
13	(ii)	The DMCA Unduly Burdens The Exercise Of First Amendment Rights	21
14	(iii)	The DMCA Impairs The First Amendment Right To Access Non-Copyrighted Works	22
15	(iv)	A Prohibition On DVD Copy Code Is Not Necessary To Advance Any Significant Government Interest.....	23
16			
17	2.	The DMCA Unconstitutionally Restricts 321’s Speech	25
18	(i)	The DMCA Regulates Speech On The Basis Of Its Content.....	26
19	(ii)	Computer Code Is Speech Protected By The First Amendment	27
20	(iii)	The DMCA Regulates Both Function And Expression.....	28
21			

TABLE OF AUTHORITIES

FEDERAL CASES

	Page	
4	<i>44 Liquormart v. Rhode Island</i> , 517 U.S. 484 (1996).....	19
5		
6	<i>A&M Records, Inc. v. Abdallah</i> , 948 F. Supp. 1449 (C.D. Cal. 1996).....	24
7		
8	<i>A&M Records v. Napster, Inc.</i> , 114 F. Supp. 2d 896 (N.D. Cal. 2000).....	13
9		
10	<i>Alcatel USA Inc. v. DGI Tech, Inc.</i> , 166 F.3d 772 (5th Cir. 1999)	38
11		
12	<i>American Booksellers Associate v. Hudnut</i> , 771 F.2d 323 (7th Cir. 1985)	30
13		
14	<i>Amoco Product Co. v. Gambell</i> , 480 U.S. 531 (1987).....	40
15		
16	<i>Arkansas Writers' Project, Inc. v. Ragland</i> , 481 U.S. 221 (1987).....	22, 26
17		
18	<i>Ashcroft v. Free Speech Coalition</i> , 535 U.S. 234 (2002).....	20
19		
20	<i>Baker v. Selden</i> , 101 U.S. 99 (1879).....	35
21		
22	<i>Bantam Books, Inc. v. Sullivan</i> , 372 U.S. 58 (1963).....	21
23		
24	<i>Bartnicki v. Vopper</i> , 532 U.S. 514 (2001).....	24, 25, 30
25		
26	<i>Bernstein v. United States Department of State</i> , 922 F. Supp. 1426 (N.D. Cal. 1996).....	28, 29
27		
28	<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973).....	34
29		
30	<i>Brulotte v. Thys Co.</i> , 379 U.S. 29 (1964).....	37
31		
32	<i>Burrey v. Pacific Gas & Electric Co.</i> , 159 F.3d 388 (9th Cir. 1998)	15
33		

		-v-
1	<i>Bursey v. United States,</i> 466 F.2d 1059 (9th Cir. 1972)	20
2		
3	<i>Carey v. Brown,</i> 447 U.S. 455 (1984).....	27
4		
5	<i>City of Boerne v. Flores,</i> 521 U.S. 507 (1997).....	35
6		
7	<i>City of Ladue v. Gilleo,</i> 512 U.S. 43 (1994).....	32
8		
9	<i>Clark v. Community for Creative Non-Violence,</i> 468 U.S. 288 (1984).....	23
10		
11	<i>Clayton v. Stone,</i> 5 F. Cas. 999 (C.C.S.D.N.Y. 1829)	35
12		
13	<i>Craig v. Boren,</i> 429 U.S. 190 (1976).....	20
14		
15	<i>Denver Area Education Telcoms. v. FCC,</i> 518 U.S. 727 (1996).....	21, 25, 29
16		
17	<i>Easyriders Freedom F.I.G.H.T. v. Hammigan,</i> 92 F.3d 1486 (9th Cir. 1996)	40
18		
19	<i>Eisenstadt v. Baird,</i> 405 U.S. 438 (1972).....	20
20		
21	<i>Eldred v. Ashcroft,</i> 123 S. Ct. 769 (2003).....	20, 21
22		
23	<i>Feist Publications v. Rural Telegraph Service Co.,</i> 499 U.S. 340 (1991).....	34, 35
24		
25	<i>First National Bank v. Bellotti,</i> 435 U.S. 765 (1978).....	22
26		
27	<i>Fonovisa, Inc. v. Cherry Auction, Inc.,</i> 76 F.3d 259 (9th Cir. 1996)	24
28		
		321 Studios' MPAs In Opposition To Defendants' Motion For Summary Judgment Case No. C 02-1955 SI

1	<i>National Endowment for the Arts v. Finley</i> , 524 U.S. 569 (1998).....	33
2		
3	<i>New Kids on the Block v. New American Publishing</i> , 971 F.2d 302 (9th Cir. 1992)	14
4		
5	<i>Police Department of Chi. v. Mosley</i> , 408 U.S. 92 (1972).....	26
6		
7	<i>Practice Mgmt. Information Corp. v. AMA</i> , 121 F.3d 516 (9th Cir. 1997)	37
8		
9	<i>RCA Records v. All-Fast System, Inc.</i> , 594 F. Supp. 335 (S.D.N.Y. 1984).....	24
10		
11	<i>RIAA v. Diamond Multimedia System, Inc.</i> , 180 F.3d 1072 (9th Cir. 1999)	12
12		
13	<i>Railway Labor Executives' Association v. Gibbons</i> , 455 U.S. 457 (1982).....	36, 37
14		
15	<i>Red Lion Broadcasting Co. v. FCC</i> , 395 U.S. 367 (1969).....	31
16		
17	<i>Regan v. Time</i> , 468 U.S. 641 (1984).....	27
18		
19	<i>Reno v. ACLU</i> , 521 U.S. 844 (1997).....	22, 31
20		
21	<i>Rice v. The Palladin Enter's.</i> , 128 F.3d 233 (4th Cir. 1997)	31
22		
23	<i>Riley v. National Federation of the Blind, Inc.</i> , 487 U.S. 781 (1988).....	32, 33
24		
25	<i>Roulette v. City of Seattle</i> , 97 F.3d 300 (9th Cir. 1996)	33
26		
27	<i>Rubin v. Coors Brewing Co.</i> , 514 U.S. 476 (1995).....	19
28		
	-vii-	

	-viii-
1	<i>Schneider v. State,</i> 308 U.S. 147 (1939).....23
2	
3	<i>Secretary of Maryland v. Joseph H. Munson Co.,</i> 467 U.S. 947 (1984).....33
4	
5	<i>Sega Enterprises Ltd. v. Accolade, Inc.,</i> 1993 U.S. App. LEXIS 78 (9th Cir. 1993) ..17
6	
7	<i>Sega Enterprises v. MAPHIA,</i> 948 F. Supp. 923 (N.D. Cal. 1996).....24
8	
9	<i>Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board,</i> 502 U.S. 105 (1991).....22, 23, 26
10	
11	<i>Sony Computer Ent'l, Inc. v. Connectix Corp.,</i> 203 F.3d 596 (9th Cir. 2000) <i>passim</i>
12	
13	<i>Sony Corp. of America v. Universal City Studios, Inc.,</i> 464 U.S. 417 (1984)..... <i>passim</i>
14	
15	<i>Texas v. Johnson,</i> 491 U.S. 397 (1989).....26
16	
17	<i>Thomas v. Chi. Park District,</i> 534 U.S. 316 (2002).....20
18	
19	<i>Trade-Mark Cases</i> , 100 U.S. 82 (1879).....34
20	
21	<i>Turner Broad. System v. FCC,</i> 512 U.S. 622 (1994)..... <i>passim</i>
22	
23	<i>Union Carbide Corp. v. Ever-Ready, Inc.,</i> 531 F.2d 366 (7th Cir. 1976) ..38
24	
25	<i>United Sates v. O'Brien,</i> 391 U.S. 367 (1968).....26
26	
27	<i>United States v. Elcom,</i> 203 F. Supp. 2d 1111 (N.D. Cal. 2002) <i>passim</i>
28	
	<i>United States v. Lopez,</i> 514 U.S. 549 (1995).....35
	<i>United States v. Moghadam,</i> 175 F.3d 1269 (11th Cir. 2000) ..37
	<i>United States v. Poocha,</i> 259 F.3d 1077 (9th Cir. 2001) ..30

1	<i>Universal Studios, Inc. v. Corley,</i> 273 F.3d 429 (2d Cir. 2001).....	<i>passim</i>
2	<i>Universal Studios v. Reimerdes,</i> 111 F. Supp. 2d 294 (S.D.N.Y. 2002).....	<i>passim</i>
4	<i>Vault Corp v. Quaid Software Ltd.,</i> 847 F.2d 255 (5th Cir. 1988)	12
6	<i>Virginia v. America Booksellers Association,</i> 484 U.S. 383 (1988).....	20
7	<i>Waller v. Osbourne,</i> 763 F. Supp. 1144 (M.D. Ga. 1991)	30
9	<i>Walters v. Reno,</i> 145 F.3d 1032 (9th Cir. 1998)	40
11	<i>Wheaton v. Peters,</i> 33 U.S. (8 Pet.) 591 (1834)	34
13	<i>Winter v. G.P. Putnam & Sons,</i> 938 F.2d 1033 (9th Cir. 1991)	29
14	STATE CASES	
15	<i>McCollum v. CBS, Inc.,</i> 202 Cal. App. 3d 989 (1988)	30, 31
17	DOCKETED CASES	
18	<i>Lexmark International Inc. v. Static Control Components,</i> Case No. 02-571-KSF (E.D. Ky 2002)	38
20	<i>Tattered Cover, Inc. v. City of Thornton,</i> 44 P. 3d 1044, 1061 (S. Ct. Colo. 2002).....	25
22	FEDERAL STATUTES	
23	17 U.S.C. §10110
24	17 U.S.C. §102.....	.36
25	17 U.S.C. §107	11, 14
26	17 U.S.C. §107(3)11
27	17 U.S.C. §117(a)10
28	17 U.S.C. §1201(a)	9
	17 U.S.C. §1201(a)(2).....	<i>passim</i>
	17 U.S.C. §1201(a)(3).....	9
		-ix-
307369.02	321 Studios' MPAs In Opposition To Defendants' Motion For Summary Judgment Case No. C 02-1955 SI	

1	17 U.S.C. §1201(a)(3)(A)	8
2	17 U.S.C. §1201(b)(1)	<i>passim</i>
3	17 U.S.C. §1201(b)(2)	16
4	17 U.S.C. §1201(b)(2), (b)(1)	13
5	17 U.S.C. §1201(c)((1))	25

LEGISLATIVE MATERIAL

6	H.R. Rep. No. 94-1476 (1976).....	14
7	H.R. Rep. No. 105-551 (1998).....	35
8	H.R. Rep. No. 2441.....	14
9	S. Rep. No. 105-190 (1998).....	8
10	S. Rep. No. 1284.....	14
11	U.S. Const. Art. I, § 8, cl. 8.....	34
12	U.S. Const. Art. I, §8, cl. 18.....	35

13
14
15
16
17
18
19
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23
24
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321 Studios' MPAs In Opposition To Defendants' Motion For Summary Judgment
Case No. C 02-1955 SI

I. INTRODUCTION

2 In 1982, Jack Valenti, President of the Motion Picture Association of America
3 (“MPAA”), predicted: “I say to you that the VCR is to the American film producer and the
4 American public as the Boston strangler is to the woman at home alone. . . . We are going to
5 bleed and bleed and hemorrhage, unless this Congress at least protects one industry . . . whose
6 total future depends on its protection from the savagery and the ravages of this machine.”
7 Despite these dire predictions, in *Sony Corp. of America v. Universal City Studios, Inc.*, 446 U.S.
8 417 (1984), the Supreme Court upheld the legality of the VCR, concluding that most people used
9 it for “time shifting”—taping a show to watch later—which the Court ruled, after an exhaustive
10 review of the detailed factual record, was a fair use. Today, the rental of videotapes accounts for
11 approximately one quarter of the gross revenues of the motion picture industry.

12 Here, as in *Sony*, the Studios have invoked colorful imagery, but have failed to proffer
13 any evidence to support their conclusory allegations of harm. Although captioned a motion for
14 summary judgment, the Studios' motion is more in the nature of a motion to dismiss, filed before
15 any discovery and devoid of virtually any supporting facts. But whether 321 Studios' products
16 are legal under the DMCA and, if not, whether the DMCA comports with the Constitution, are
17 fact-dependent questions that cannot be resolved on summary judgment or adjudication.

II. SUMMARY OF RELEVANT FACTS

A. DVDs Are The Movie Industry's Leading Format For The Distribution Of Films

20 A DVD—a “digital versatile disc”—is a five-inch-wide plastic disk that stores the digital
21 information constituting films and videos. Moore Decl., ¶2 n.1; Schumann Decl., ¶7. Thousands
22 of video works, including feature-length motion pictures, television shows, documentaries, and
23 historical footage have been released in the DVD format. DVDs currently make up 39% of the
24 sales of video and film works. Schwerin Decl., ¶3.

25 Many movies are sold only in the DVD format, and VHS is being phased out altogether.
26 Moore Decl., ¶25; Schwerin Decl., ¶4. Moreover, the DVD format allows features such as
27 alternate soundtracks, subtitles, alternate viewing configurations and other menu-driven options.
28 Moore Decl., ¶¶26-30; Schwerin Decl., ¶7; Touretzky Decl., ¶9; Schumann Decl., ¶18. For

1 example, many DVDs contain a number of different audio tracks in different languages, or tracks
2 with running commentary from the film's director or actors. Moore Decl., ¶¶26-30. Many
3 DVDs also include video segments in addition to the main feature, such as scenes cut from a
4 movie, alternate endings that were not used in a film's theatrical release, interviews with the
5 film's cast and other so-called "bonus tracks." Some of these bonus tracks are interactive (such
6 as allowing the viewer to freeze the action and view it from different camera angles); other bonus
7 tracks may include video games that can be "played" on a DVD player. Moore Decl., ¶26;
8 Schwerin Decl., ¶7. Many bonus tracks are not available to consumers in any other format,
9 including the VHS version of the film. Moore Decl., ¶¶26-30; Schwerin Decl., ¶7.

10 **B. DVDs Are Susceptible To Damage, Scratching And Deterioration**

11 DVDs are fragile and are easily damaged. The DVD is comprised of one or two layers of
12 reflective material that holds the digital information, encased in clear plastic. Moore Decl., ¶2
13 n.1; ¶7. The plastic disk is very sensitive to scratches and cracks on the playing surface, and
14 because of the high density of the data stored on the DVD even a slight scratch or imperfection
15 in the plastic surface can lead to problems playing the DVD. Moore Decl., ¶7; Schwerin Decl.,
16 ¶6. Similarly, exposing the disk to heat or light can damage the reflective surface or the plastic
17 coating, leading to problems ranging from lost video frames, to skipping, to the complete
18 inability to play the DVD. *Id.* DVDs are also susceptible to "DVD rot" and delamination, the
19 deterioration over time of a DVD in which the plastic and one or more of the reflective coatings
20 begin to separate, rendering the DVD unplayable. Schwerin Decl., ¶6.

21 **C. CSS Is Used To Encode The Data On Certain DVDs Distributed By The Studios**

22 Many DVDs distributed by the Studios store the digital data that makes up the film in a
23 format called the "Contents Scramble System" or "CSS." The Copyright Control Authority
24 ("CCA") administers the CSS encoding scheme and the licensing of the electronic "keys" used
25 by DVD players to play back DVDs. Moore Decl., ¶10-11; Schumann Decl., ¶¶12-14. All 31
26 CSS keys and the algorithm that can be used to decode a DVD are well known and publicly
27 available on the Internet. Touretzky Decl., ¶¶7,11, 14, 22, 24; Schumann Decl., ¶22.

28 CSS is an access control system, not a copy control system. Touretzky Decl., ¶17.

1 Broadly speaking, a licensed DVD player contains a CSS key that opens a “lock” on the DVD,
2 which is contained on a “CSS lock” track, enabling the contents to be decrypted and viewed.
3 CSS does not prevent the copyrighted contents of a CSS-protected DVD from being copied.
4 Touretzky Decl., ¶¶10-17; Moore Decl., ¶¶10-13. However, the CCA does not permit licensed
5 manufacturers of DVD players to sell a DVD write drive that will write to the “CSS lock track.”
6 Likewise, under the CCA’s license requirements, the makers of blank DVD media are required
7 to block the CSS track and make blank DVDs unrecordable in that section. As a result, although
8 it is possible to make a copy of a CSS-encrypted DVD, such a copy is missing the CSS “lock.”
9 Because the copy is missing the lock, it cannot be opened by the CSS key, and cannot be
10 accessed or viewed. *Id.* So although CSS allows for copying, that copying is not particularly
11 useful.

12 The CCA’s licensing scheme can also prohibit a user from skipping or fast-forwarding
13 through certain portions of a DVD, such as advertisements or previews for other movies
14 produced by the studio selling the DVD. Moore Decl., ¶10. Taken together, the licensing
15 scheme is thus analogous to a lock on a copy of a book that you have purchased: You can sit next
16 to your bookshelf and read the book cover to cover, but you cannot skip the introduction, quote
17 your favorite passage, or repair a damaged spine.

18 **D. CSS Does Not Necessarily Correspond With Copyright Protection Of The DVD Contents**

19 CSS is used to encrypt video content that is in the public domain, including video works
20 that are not protected by copyright. These include works for which the copyrights have expired
21 and works created by the Government. Moore Decl., ¶¶33-34; Schwerin Decl., ¶9. In addition,
22 a number of CSS-encrypted DVDs contain portions that are in the public domain.

23 **E. DVD Copy Plus Consists Of Publicly Available Software And An Instruction Guide That
24 Permits Legitimate Owners Of DVDs To Create Backup Copies**

25 DVD Copy Plus consists of an electronic guide explaining how to create backup copies
26 of DVDs, bundled with two pieces of free, publicly available software which can be downloaded
27 without charge from Internet websites and are included with DVD Copy Plus as a convenience,
28 and a licensed CD burning application. Moore Decl., ¶¶2-4. The instruction manual explains

1 how to download the video and sound content of a DVD onto a CD, which can be played on a
2 computer and many DVD players. *Id.* DVD Copy Plus does not create a copy of the DVD itself,
3 but copies the video and sound contents of the DVD into a different storage medium. *Id.* DVD
4 Copy Plus cannot make a backup of the entire contents of the DVD; instead, DVD Copy Plus
5 makes a backup copy of the film only without the bonus tracks (or of a bonus track without the
6 film) which will not have the menu-driven playback options of the original DVD. *Id.* The
7 quality of the video CDs created by DVD Copy Plus is lower than the original DVD. *Id.* As
8 explained on 321's website and in other marketing materials, DVD Copy Plus is intended to
9 permit legitimate DVD owners to create archival backup copies of the DVDs they already own
10 (whether encoded with CSS or not), as well as to engage in other fair uses. *Id.*

11 F. **DVD X Copy Can Make An Archival Backup Copy Of A DVD Or To Restore Data That
12 Cannot Otherwise Be Retrieved From Damaged DVDs**

13 DVD X Copy is software that allows a DVD owner to make an archival backup copy of
14 an original DVD, including original menus and special features. Moore Decl., ¶5. DVD X Copy
15 reads the data on the DVD drive, decodes it as necessary, and then uses the data to create a
16 backup copy of the DVD. *Id.* ¶6. DVD X Copy can be used to create backup copies of DVDs
17 encoded with or without CSS, including home movies. *Id.* In order to read CSS-encoded data,
18 DVD X Copy uses a well known and publicly available CSS key. Moore Decl., ¶¶8-9. DVD X
19 Copy then uses the well-known CSS algorithm to decode the data, and in this respect, DVD X
20 Copy works just like any licensed DVD player. *Id.*

21 In addition to being able to create backup copies of DVDs, DVD X Copy also has the
22 ability to recover the data from DVDs that have been scratched or damaged. Moore Decl., ¶7.
23 DVD X Copy uses the error correction data placed on DVDs to recover data that has been lost
24 due to damage. *Id.* If DVD X Copy is able to create a backup from a DVD, the backup copy
25 will be able to play, even if the damaged original DVD is unplayable. *Id.*

26 G. **DVD Copy Code Is Not An Instrument Of Piracy**

27 321's customers use DVD Copy Plus and DVD X Copy (collectively "DVD Copy
28 Code") for diverse purposes: A medical physicist inserts clips from popular movies into training

1 tapes for radioactive patients and nursing staff (Still), a dentist makes excerpts from instructional
 2 videos to use in lectures (Levitt), an IT administrator allows children at a school to view DVDs
 3 over the school's network (Millhouse), an electronics engineer learns about MPEG video
 4 (Pfeninger), a computer administrator backs up data at a hospital (Koop), a producer of wedding
 5 videos makes multiple copies of clients' wedding DVDs (Yaciw), a retiree copies his home
 6 movies (Stier), a student makes copies of class teaching aides (Omojola), a father edits out
 7 material he deems inappropriate for his children (Jones), a student expresses himself by
 8 incorporating clips from films in his own artistic works (Goscha), a computer aided drafter
 9 makes copies of animations to which he owns the copyrights (Piell), a doctor makes copies of his
 10 patients' radiographs (Bevans), a woodworker copies instructional videos so that they will play
 11 on his computer DVD drive (Gage), a retiree transfers his VHS tapes into DVD format
 12 (Hummel), and a small business owner recovers his scratched DVDs (Lang). The list goes on
 13 and on. Farnham Decl., Exh. A.

14 It is unlikely that anyone would use DVD Copy Code to copy DVDs for sale or
 15 distribution in a manner prohibited by the Copyright Act. Burke Decl., ¶19; Moore Decl., ¶¶4,
 16 14-21. It is impractical to use DVD Copy Plus as a method of mass-producing bootleg copies of
 17 DVDs because the process of copying a DVD video takes between four to six hours, and the
 18 resulting copy's image quality is inferior to the original. *Id.* It is likewise impractical to make
 19 bootlegged or pirated copies of DVDs using DVD X Copy, which has several built-in anti-piracy
 20 measures. First, the program makes a copy of a DVD onto another DVD, and erases the data
 21 from the computer's hard drive to prevent any distribution of an unencrypted copy over the
 22 Internet. Moore Decl., ¶15; Burke Decl., ¶¶14-15. Second, an indelible visible disclaimer is
 23 placed onto each backup copy of a DVD made by the user of the DVD X Copy software. Moore
 24 Decl., ¶16; Burke Decl., ¶16. The disclaimer states:

25 DVD BACKUP. You are viewing an archival backup copy of a DVD, created
 26 solely for the private and personal use of the owner of the DVD from which it was
 27 made. Federal copyright laws prohibit the unauthorized reproduction, distribution,
 28 or exhibition of copyrighted materials, if any, contained in this archival backup
 copy. The resale, reproduction, distribution, or commercial exploitation of this
 archival backup copy is strictly forbidden. We ask you to respect the rights of
 copyright holders.

1 This disclaimer, which appears on the screen for approximately eight seconds, cannot be skipped
2 and is displayed each time the DVD is played in a DVD player. Moore Decl., ¶16. Third, DVD
3 X Copy places a digital semaphore in each and every copy of a DVD it creates. *Id.*, ¶17. That
4 digital semaphore prevents DVD X Copy from making further copies of the backup copy of the
5 DVD. Thus, a user of DVD X Copy must have an original DVD in order to make a copy and
6 cannot use DVD X Copy to make serial copies of a DVD. *Id.* Finally, the data on a copy of a
7 DVD created using DVD X Copy is digitally watermarked so that 321 can trace any particular
8 copy back to the computer that was used to create it, based on the license that is required to
9 activate the software. *Id.*, ¶18. If 321 determines that a particular copy of its software is being
10 misused, 321 can remotely disable that copy of the software. *Id.*, ¶19.

11 321 markets its products for uses that include making archival backup copies of DVDs,
12 and explains to potential customers that the products are useful for copying all kinds of DVD
13 video content, including home movies and other materials not covered by any copyright or the
14 CSS scheme. Moore Decl., ¶21. The Internet websites operated by 321, as well as the materials
15 and instructions included with DVD Copy Plus and DVD X Copy, explain to users that the
16 instructions and software must be used only to create legitimate copies of the contents of DVDs
17 in a manner consistent with the copyright laws. *Id.*, ¶¶22-24. DVD Copy Plus and DVD X
18 Copy include the following warning on its packaging and in the instruction materials:

19 RESPECT THE RIGHTS OF ARTISTS. DVD Copy Plus allows you to make
20 backup copies of movies you own or movies you have created. It is against the law to
21 make or distribute reproductions of copyrighted material for most purposes other than
your own use. This software is designed for you to make a backup copy for personal
use only. We respect the rights of artists and ask you to do the same. *Id.*, ¶21.

22 321 actively discourages anyone from using these products to create pirated copies of
23 copyrighted DVDs. Moore Decl., ¶22-24. 321 has offered to assist the Studios and the MPAA
24 in tracking down anyone who has used 321 products to create pirated copies of DVDs. *Id.* 321
25 also has publicly announced that it will assist in the apprehension of people that may attempt to
26 use 321's products to illegally copy DVDs, and announced a \$10,000 reward for information
27 leading to the arrest and conviction of any person who uses 321's products to copy DVDs
28 illegally. *Id.* To date, the Studios have come forward with no evidence that *anyone* has ever

used DVD Copy Code for an illegal purpose.

III. LEGAL ANALYSIS

DVD Copy Code Is Not Prohibited Under The DMCA

4 A good analogy can be a powerful tool, fostering the understanding of otherwise difficult
5 technology and law. Indeed, the process of applying copyright law has been described as
6 “deciding whether a horse is more like an apple or an orange.” But analogies are only as helpful
7 as they are accurate. The Studios are fond of analogizing 321 Studio’s software, describing it at
8 various points as “like a skeleton key that can open a locked door” (Motion at 7), “the electronic
9 equivalent of breaking into a castle” (*Id.* at 11), “the electronic equivalent of breaking into a
10 locked room in order to obtain a copy of a book” (*Id.*), “break[ing] into a house” (*Id* at 16), and
11 removing “security devices that will activate alarms if the products are taken away without
12 purchase” (*Id.*)

These are powerful images, but they are quite wrong. Each of the Studios' analogies is misleading because each ignores the central fact that makes 321's DVD Copy Code legal: The end user isn't gaining access to anyone's "castle" but her own. DVD Copy Code works on *original* DVDs the user has already purchased, and thus unquestionably has the right to access. 321 has put in place technological measures that effectively preclude the use of 321's software for illicit, "serial copying" purposes. Thus—to align the Studios' colorful imagery with the facts in *this* case—321's software is the electronic equivalent of calling a locksmith to obtain a duplicate key that will allow one to unlock the front door to one's own home. This crucial distinction is what makes this case completely different from *Universal Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) and *United States v. Elcom*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002), both of which involved computer programs that arguably facilitated the instant redistribution of copyrighted content over the internet.¹

¹ DVD Copy Code is very different from the computer programs at issue in *Corley* and *Elcom*, both of which were found to have the primary purpose of allowing access to those who had not paid for it. *Elcom* involved Advanced eBook Processor ("AEBPR"). Like most other forms of digital content, digital eBooks are distributed for free download, but because they are encrypted, the user must purchase his or her own key to access the contents. ARBPR allows a user to access an eBook for free, without buying the key, and to redistribute the unlocked version widely over the Internet. *Elcom* at 1118-19. *Corley*

1 **1. DVD Copy Code Does Not “Circumvent” Encryption**

2 The Studios accuse 321 of violating two separate sections of the DMCA: §1201(a)(2),
 3 which regulates devices providing unauthorized *access* to works, and §1201(b), which regulates
 4 devices enabling *violation of a copyright holder’s rights* (such as illegal copying). Only
 5 §1201(a)(2) applies to DVD Copy Code, because CSS controls access to DVDs, not the copying
 6 of DVDs. CSS prevents unauthorized access to a DVD by requiring a key in order to view the
 7 data contained on the DVD. Touretzky Decl., ¶10-14. CSS does not prevent the copying of the
 8 encrypted data on the DVD. *Id.*, ¶17; Schumann Decl., ¶19. Thus, any circumvention of CSS
 9 raises issues under §1201(a), which governs unauthorized access, but does not raise issues under
 10 §1201(b), which governs technological measures that protect against copying. Indeed, Congress
 11 recognized that “the two sections are not interchangeable, and many devices will be subject to
 12 challenge under one of the subsections.” S. Rep. 105-190 at 12 (1998).

13 **a. 321 Does Not Violate Section 1201(a)(2)**

14 Section 1201(a)(2) prohibits trafficking in tools that “circumvent a technological
 15 measure” in order to gain access to a work.² “Circumvent a technological measure” is defined in
 16 §1201(a)(3)(A): to “circumvent a technological measure” means to descramble a scrambled
 17 work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair
 18 a technological measure, **without the authority of the copyright owner.**” (Emphasis added.)

19 Remarkably, the Studios’ brief misquotes this definition, removing (without ellipses) the
 20 key phrase “without the authority of the copyright holder.” Motion at 13. This omission is

21 involved DeCSS, which allows the user to distribute an unencrypted copy of a CSS-protected movie over
 22 the Internet, at the touch of a button, to users who would then be able to watch the unencrypted movie
 23 without having paid for it. Notwithstanding *Corley*’s entry of a permanent injunction, DeCSS remains
 24 widely available for free download on the Internet. Moore Decl., ¶20; Burke Decl., ¶16; Touretzky Decl.,
 25 ¶36-40; Schumann Decl., ¶22.

26 ² Section 1201(a)(2) provides that: “No person shall manufacture, import, offer to the public, provide, or
 27 otherwise traffic in any technology, product, service, device, component, or part thereof, that—
 28 (A) is primarily designed or produced for the purpose of circumventing a technological measure that
 effectively controls access to a work protected under this title;
 (B) has only limited commercially significant purpose or use other than to circumvent a technological
 measure that effectively controls access to a work protected under this title; or
 (C) is marketed by that person or another acting in concert with that person with that person’s knowledge
 for use in circumventing a technological measure that effectively controls access to a work protected

1 critical. Because “circumvention” is by express definition limited to *unauthorized access*, DVD
 2 Copy Code does not violate §1201(a)(2) for an obvious reason: It works *only* on original DVDs.
 3 By definition, *any* purchaser of a DVD has the right to *access* its content; otherwise, he has
 4 purchased nothing but an expensive coaster. Indeed, if providing the means to decrypt
 5 scrambled content to the rightful owner of the original disk constituted “circumvention” under
 6 §1201(a)(2), then *every* manufacturer of DVD players would violate that section because all
 7 DVD players must descramble a scrambled work and decrypt an encrypted work in order to play
 8 a DVD. DVD players do not violate the DMCA because—just like DVD Copy Code—they are
 9 a tool for use by the persons who have the right to access the contents of the DVDs.³

10 The Studios nonetheless urge this Court to hold that providing the tools for users to
 11 access content they are authorized to access violates §1201(a)(2). This absurd result can only be
 12 achieved by doing what the Studios literally do in their brief: removing the words “**without the**
 13 **authority of the copyright owner**” from the text of the statute.⁴ §1201(a)(3) (emphasis added).

14 **2. 321 Does Not Violate Section 1201(b)**

15 The Studios also assert that 321’s software violates §1201(b), which prohibits devices
 16 that circumvent technological measures protecting “a right of a copyright holder.”⁵ Section (b)
 17

18 under this title.”

19 ³ The Studios make much of the “strict requirements” of “CCA licensing procedures.” Motion at 4.
 20 Those provisions are irrelevant here, as neither 321 nor its users are parties to those contracts. DVDs are
 21 sold outright, not licensed, and the Studios thus have no right to impose any use restrictions on their
 22 purchasers other than those provided by copyright law. They can no more dictate to users which
 23 decryption software to use than a book author can tell a buyer he must not skip the introduction.

24 ⁴ Because 321’s software can only be used on original DVDs, the Studios’ reliance on *Elcom* and *Corley*
 25 is misplaced. *Elcom* did not address the “without the authority of the copyright holder” language in
 26 §1201(a)(2) at all. Although *Corley* did briefly address the “without the authority of the copyright
 27 holder” language of §1201(a)(3)(A), it did so in a different context, because the court concluded that
 28 DeCSS allows persons without authority (*i.e.*, those who have not purchased a DVD) to view a DVD.
 Unlike DeCSS, DVD Copy Code creates physical backups of DVDs, not electronic files that can be
 shared on the Internet, and thus is intended to preclude any such unauthorized viewing.

29 ⁵ That section provides: “(1) No person shall manufacture, import, offer to the public, provide, or
 30 otherwise traffic in any technology, product, service, device, component, or part thereof, that—
 31 (A) is primarily designed or produced for the purpose of circumventing protection afforded by a
 32 technological measure that effectively protects a right of a copyright holder under this title in a work or
 33 portion thereof;
 34 (B) has only limited commercially significant purpose or use other than to circumvent protection afforded
 35 by a technological measure that effectively protects a right of a copyright holder under this title in a work or
 36 portion thereof; or

1 was designed to combat the copyright infringement of digital works (*i.e.*, the violation of “a right
 2 of a copyright holder”). As discussed above, any circumvention of CSS falls under §1201(a), not
 3 §1201(b).⁶ Even if §1201(b) did apply, however, DVD Copy Code would not violate that
 4 section because its primary and intended use does not violate any right of a copyright holder.
 5 Many uses of DVD Copy Code either do not implicate the DMCA at all (*e.g.*, making copies of
 6 DVDs not encoded with CSS), or do not implicate copyright infringement (*e.g.*, making copies
 7 of DVDs, or excerpts from DVDs, in the public domain).⁷ Others unquestionably constitute the
 8 fair use of copyrighted materials (*e.g.*, making clips from DVDs for purposes of commentary,
 9 scholarship or discussion, or making a playable copy of a scratched DVD). The other main use
 10 of DVD Copy Code—making a single, archival backup copy of a movie that the user has already
 11 purchased—is also authorized under the copyright law.

12 **a. Section 117 Of The Copyright Act Allows Users To Make Archival Copies**

13 Section 117 of the Copyright Act provides that “it is not an infringement for the owner of
 14 a copy of a computer program to make or authorize the making of another copy or adaptation of
 15 that computer program provided: . . . (2) that such new copy or adaptation is for archival
 16 purposes only and that all archival copies are destroyed in the event that continued possession of
 17 the computer program should cease to be rightful.” 17 U.S.C. §117(a). The Act defines
 18 “computer programs” as “a set of statements or instructions to be used directly or indirectly in a
 19 computer in order to bring about a certain result.” 17 U.S.C. §101.

20 DVDs—whether they contain digital video, digital audio, or programs to control the
 21 selection and display of other content on the disk (or, in virtually all cases, a combination of the
 22 three)—are computer programs under §117. Touretzky Decl., ¶41. The contents of a DVD
 23

24 (C) is marketed by that person or another acting in concert with that person with that person’s knowledge
 25 for use in circumventing protection afforded by a technological measure that effectively protects a right of
 26 a copyright holder under this title in a work or portion thereof.” §1201(b)(1).

27 ⁶ There is also a disputed question of fact at this point whether CSS “effectively” controls anything,
 28 particularly since all the player keys are in the public domain, and DeCSS is widely available on the
 Internet. Moore Decl., ¶20; Burke Decl., ¶16; Touretzky Decl., ¶36-40; Schumann Decl., ¶22.

27 ⁷ Unauthorized extraction of unprotectable content from a copyrighted work has consistently been held
 28 not to violate a copyright. *See, e.g., Sony Computer Ent’l, Inc. v. Connectix Corp.*, 203 F.3d 596, 602-08
 (9th Cir. 2000).

1 consist entirely of a series of millions of zeroes and ones, which must be converted into what we
 2 call a "movie." *Id.*, ¶3. In some instances, those functions are performed on a standalone DVD
 3 player, which contains computer circuitry to read the program on the disk, perform millions of
 4 computations based on that digital information, and create a display and accompanying sound on
 5 a television. In other instances, the same functions are performed by a "general purpose"
 6 computer. In either case, the machine must perform millions of calculations on the digital
 7 information from the DVD, first applying keys contained on the disk to decrypt the data, then
 8 dividing and packaging that data into electronic commands to draw pictures on a screen and
 9 make sounds through speakers. Whether "played" on a computer or a DVD player, the DVD is a
 10 set of instructions that are used by a computer to bring about a certain result.⁸ Therefore, making
 11 personal backup copies of DVDs is expressly authorized under the copyright laws.

12 **b. Making An Archival Backup Copy Is A Fair Use Under Section 107**

13 Section 107 of the Copyright Act sets forth a non-exclusive list of four factors to be
 14 considered in assessing whether an act is fair use: "(1) the purpose or character of the use,
 15 including whether such use is of a commercial nature or is for nonprofit educational purposes;
 16 (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in
 17 relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential
 18 market for or value of the copyrighted work." 17 U.S.C. §107.

19 In *Sony*, the court found that the practice of recording commercial television broadcasts
 20 was fair use, notwithstanding that users typically taped the entire program. The Court explained
 21 that where the use is non-commercial, "the fact that the entire work is reproduced, see §107(3),
 22 does not have its ordinary effect of militating against a finding of fair use." *Sony*, 464 U.S. at
 23 449-50. *Sony* concluded that recordings that allow a user to view the same content at different

24

 25 ⁸ The Studios will likely argue that DVDs are not properly viewed as computer programs, because some
 26 (though not all) of the digital information contained therein is properly labeled "data" rather than
 27 "programs." To begin with, this is an artificial distinction, as any computer "program" or "data" consists
 28 of an unbroken string of ones and zeroes to be sequentially read into a computer, which will then perform
 functions based on the content of that string of data. Moreover, the same argument can be made
 concerning virtually any modern "computer program": The vast majority of the information in video
 games, educational software, and electronic books ("eBooks"), for example, consists of what can be
 called "data" (such as graphics, text, and sounds) rather than "programs." Finally, increasing amounts of

1 times are clearly non-commercial, even though the user is making an additional, permanent and
 2 complete copy of the copyrighted work, for two reasons. *Id.* First, a user who records television
 3 programs is authorized to view them. *Id.* Second, the harmful effects of the use upon the
 4 potential market for the work could not simply be presumed: “[a] challenge to a non-commercial
 5 use of a copyrighted work requires proof either that the particular use is harmful, or that if it
 6 should become widespread, it would adversely affect the potential market for the copyrighted
 7 work.” *Id.* at 451. In order to establish that non-commercial copying was not a fair use, “[w]hat
 8 is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of
 9 future harm exists.” *Id.* (Emphasis in original)

10 *Sony* compels the conclusion that making archival backup copies of DVDs is a fair use.
 11 Indeed, the *Elcom* court reached the same conclusion with respect to eBooks:

12 Courts have been receptive to the making of an archival copy of electronic media
 13 in order to safeguard against mechanical or electronic failure. See *Vault Corp v.*
Quaid Software Ltd., 847 F.2d 255, 267 (5th Cir. 1988). *Making a back-up copy*
of an ebook, for personal noncommercial use would likely be upheld as a non-
infringing fair use.

15 *Elcom*, 203 F. Supp. 2d at 1135 (emphasis added). Similarly, in *RIAA v. Diamond Multimedia*
 16 *Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999), the Ninth Circuit held, again after reviewing a
 17 detailed factual record, that most people used the MP3 player to “space shift,” which was a fair
 18 use, noting that “such copying is paradigmatic non-commercial personal use entirely consistent
 19 with the purposes of the Act.” *Id.* at 1079.

20 To the extent that there is any doubt on this point, the likelihood of future harm and the
 21 impact on the market for DVDs is a factual question that cannot be resolved on summary
 22 judgment. The Studios have not shown that the use of DVD Copy Code has *any* present or
 23 future impact on the market for their products, and indeed have made no effort to do so. The
 24 Studios will no doubt argue, on Reply, that there are other possible uses (and misuses) of 321’s
 25 software: One could use it to make a copy of a DVD borrowed from a friend, or a DVD rented
 26 from a video store, or give the copy to someone else. Perhaps. But exactly the same possibilities
 27 existed in *Sony*: A VCR can be used to copy a television broadcast for sale, or to make a copy of

28 content on DVDs is interactive, such as video games that must be played on a computer’s DVD drive.

-12-

example, §1101 sets forth the right to fix performances of musical works and does not contain an explicit fair use provision, but such a right surely could be asserted by a professor who played a bootleg recording of Maria Callas in an opera appreciation course. Jane C. Ginsburg, *Copyright Use and Excuse On The Internet*, Columbia-VLA journal of Law & Arts, Fall 2000, p.9, n.28.¹⁰

5 As noted by the Registrar of Copyrights, (H.R. Rep. No. 2441 and S. Rep. No. 1284):
6 This legislation clarifies existing law and expands specific exemptions for
7 laudable purposes. These specific exemptions are supplemented by the broad
8 doctrine of fair use. Although not addressed in this bill, fair use is both a
fundamental principle of the U.S. copyright law and an important part of the
necessary balance on the digital highway. *Therefore, the application of fair use
the digital environment should be strongly reaffirmed.*

(Emphasis added.) The DMCA is thus in accord with the common law, and explicitly preserves fair use as a general limitation on the rights set forth in Title 17, including §§1201(a)(2) and (b).

(iii) DVD Copy Code Does Not Interfere With A Right Of A Copyright Holder

In codifying the copyright fair use doctrine at 17 U.S.C. §107, Congress disavowed any intent to “freeze” the doctrine, “especially during a period of rapid technological change.” See H.R. Rep. No. 94-1476 at 66 (1976). Indeed, the fair use doctrine has always been interpreted to change as technology changes: For example, the “time shifting” allowed under *Sony* did not exist until VCRs were introduced. The Studios suggest that §1201, rather than changing with new technologies, simply relegates fair use to the analog past. They argue that, in enacting the DMCA, Congress pretended that the DMCA did nothing to affect the right of fair use while actually prohibiting all the tools necessary to engage in it. Congress was not so underhanded.

Because Congress did not, and as discussed *infra*, could not constitutionally eliminate fair use in the digital realm, §1201(b) does not bar *all* tools that can defeat technological measures. Rather, it only bars only a tool that “is primarily designed or produced for the purpose of” (§1201(b)(1)(A)), “has only limited commercially significant purpose other than” (§1201(b)(1)(B)), or “is marketed . . . for use in” (§1201(b)(1)(C)) circumventing the protection “of a right of a copyright holder.” Without proof of one of these three elements, which were

²⁸ ¹⁰ Cf. *New Kids on the Block v. New American Publishing*, 971 F.2d 302 (9th Cir. 1992) (fair use of trademarks).

1 “without the authority of the copyright holder.”¹² Thus the only reason an authorized decryption
 2 tool does not violate the DMCA is that its primary purpose is not to infringe copyright. If one
 3 reads the infringing purpose limitation out of §1201(b), the baby goes out with the bath water,
 4 and every decryption tool is illegal. The statute makes sense only by inclusion of the infringing
 5 purpose limitation, and that limitation makes the DVD Copy Code legal.

6 (iv) **DVD Copy Code Does Not “Circumvent” Encryption**

7 DVD Copy Code does not violate §1201(b)(2) for the additional reason that it does not
 8 “circumvent” encryption. Section 1201(b) defines to “circumvent protection afforded by a
 9 technological measure” as “avoiding, bypassing, removing, deactivating or otherwise impairing a
 10 technological measure.” 17 U.S.C. §1201(b)(2). Even under the Studios’ reading of §1201(b),
 11 DVD Copy Code does none of these things. First, it does not “avoid” or “bypass” the encryption
 12 of a DVD. Instead, it simply uses the authorized key to unlock the encryption. In this respect,
 13 DVD Copy Code is no different from any commercially-available DVD player. Moore Decl.,
 14 ¶8.

15 Second, DVD Copy Code does not “remove, deactivate or otherwise impair” the
 16 encryption on a DVD, because the original DVD is completely unchanged, and its encryption
 17 remains intact. Touretzky Decl., ¶¶4, 6. This is not mere semantics: Because DVD Copy Code
 18 does not strip the encryption from the original DVD, it does not allow it to be copied *seriatim*.
 19 The Studios may argue that DVD Copy Code circumvents encryption because the *copy* of the
 20 DVD made with DVD Copy Code is not encrypted. But the Studios cannot credibly argue that
 21 §1201(b) prohibits the making of any unencrypted *copy* of a DVD, regardless of whether doing
 22 so constitutes copyright infringement. It is literally impossible to use a DVD at all without
 23 making such a copy of its content. Touretzky Decl., ¶29; Schumann Decl., ¶19. First, in order to
 24

25 ¹² The omission of “without the authority of the copyright holder” cannot be ignored, because Congress
 26 included it in the parallel definition in §1201(a). Under the doctrine of *expressio unius est exclusio
 27 alterius*, when a legislature explicitly includes a word or phrase in one section of a statute, but omits that
 28 same word or phrase from another section, courts presume that the omission was intentional and that the
 legislature intended to impose a different rule. *See Russello v. United States*, 464 U.S. 16, 23 (1983)
 (“[W]here Congress includes particular language in one section of a statute but omits it in another section
 of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate
 inclusion or exclusion.”).

1 decrypt the encrypted content, that content must be copied into memory before the mathematical
2 computations of the decryption process can be executed. Then, the decrypted results of that
3 process must also be stored in memory. Thereafter, depending on whether the DVD is being
4 played on a standalone DVD player or a computer, and depending on whether the monitor is
5 analog or digital, additional copies of the data are created in digital to analog converters, in video
6 driver boards or buffers, and the like. Touretzky Decl., ¶¶29-30; Schumann Decl., ¶¶19-21.

7 These copies, although typically transitory, are nonetheless copies. *MAI Systems Corp. v.*
8 *Peak Computer Inc.*, 991 F.2d 511, 518 (9th Cir. 1993). Inescapably, at least some copying of
9 DVDs is permitted, notwithstanding both copyright law and the DMCA. The Studios, of course,
10 will retort that this is not the sort of copying that concerns them; it is simply the sort of copying
11 that is the natural byproduct of lawful use of DVDs. After all, such copying does not supplant
12 the market for their films, as the user must first purchase a DVD in order to create those copies.
13 They are copies made for non-commercial purposes, with no effect on the potential market for
14 the copyrighted work. But that is precisely the point; the transitory copies created by any DVD
15 player do not violate any right of the copyright holder because they are a fair use of the work in
16 question, just like the archival copies made by 321's software.

17 The Studios' arguments also fail, as a factual matter, as to DVD X Copy, because that
18 software does not remove, deactivate or impair copy protection, even on the copied DVD. The
19 Studios' own expert admits as much: A copy made using DVD-X-Copy includes copy
20 protections to ensure that no serial copying will take place. That copy protection is not identical
21 to CSS, because the Studios have structured the CSS licensing scheme to preclude its inclusion
22 on a copy made by DVD Copy Code. Moore Decl., ¶¶10-13. But the Studios' design choice
23 cannot circumvent the safeguards of the DMCA. *Sega Enterprises Ltd. v. Accolade, Inc.*, 1993
24 U.S. App. LEXIS 78, 3 (9th Cir. 1993) (rejecting trademark infringement claim because Sega
25 bore primary responsibility for designing system in order to create trademark infringement by
26 would-be fair users). To the extent the Studios argue that the copy protections contained in DVD
27 X Copy are inadequate, that is a factual question that cannot be resolved on summary judgment.
28

1 **3. 321 Does Not Violate Any Of The Three Statutory Prongs Of Either Section**

2 Finally, even accepting the Studios' interpretation of the DMCA as eliminating fair use
3 altogether, there are still disputed issues of fact under each statutory subsection that preclude
4 summary judgment.

5 **a. DVD Copy Code Is Not Primarily Designed Or Produced To Circumvent**

6 DVD Copy Code was not primarily designed and produced to circumvent a technological
7 measure; it was primarily designed and produced to allow users to make copies of all or part of a
8 DVD. Moore Decl., ¶¶21-24. DVD Copy Code includes within it much more than the DVD
9 player key that unlocks the encryption. For example, DVD Copy Code works on DVDs that
10 have no CSS encryption, and customers purchase and use it in order to make copies of such
11 DVDs. *Id.* The ability to unlock CSS is just one feature of DVD Copy Code.

12 The Studios appear to acknowledge the force of this argument, but contend that, even if
13 DVD Copy Code as a whole is not primarily designed to circumvent, one utility within it
14 satisfies that requirement. The Studios further argue that §1201(b) prohibits the sale of any
15 "technology, product, . . . or *part* thereof" that is primarily designed to circumvent, and that if
16 any part of DVD Copy Code is primarily designed to circumvent, the whole product is prohibited
17 under the DMCA. That argument ignores the plain language of the statute: 321 does not sell
18 individual components or "parts"; it sells DVD Copy Code. Under the Studios' interpretation of
19 the statute, the words "primarily designed" would be surplusage, because it would always be
20 possible to isolate the offending portion of any software that had the circumvention feature and
21 thus pronounce the entire product illegal. That is not what the DMCA provides.

22 **b. DVD Copy Code Does Not Have Only Limited Commercially Significant
23 Purposes Other Than To Circumvent**

24 DVD Copy Code has a number of commercially significant purposes, of which unlocking
25 CSS encryption is only one. DVD Copy Code is used, for example, to make copies of home
26 movies to send to relatives and to make copies of instructional videos. Moreover, even when
27 used to make backup copies of CSS-protected works, or to make a copy of a damaged DVD, the
28 unlocking of the encryption is only incidental to the legal copying of the content. The Studios

1 have proffered no evidence regarding the substantiality of those uses, which is a factual question
2 that cannot be resolved on summary judgment.

3 **c. A Prohibition On Truthful Marketing Violates The First Amendment**

4 Unlike subsections (A) and (B), subsection (C) concerns not the sale of a device, but
5 rather what is said about that device: It prohibits marketing a product for use in circumventing
6 protection. Thus, according to the Studios' interpretation, a product might be perfectly legal
7 under every other section of the DMCA, but nonetheless the seller could be prohibited from
8 telling potential customers about certain uses of the product—even if those uses are themselves
9 perfectly legal. 321 markets DVD Copy Code for a variety of legal purposes, including making
10 backup copies of lawfully purchased DVDs. A prohibition on the dissemination of such truthful
11 information about the product's legal attributes cannot be reconciled with the First Amendment.
12 *See Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (First Amendment right to list alcohol
13 content of beer on label); *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (striking down
14 prohibition on alcohol price advertisements).

15 **B. As Construed By The Studios, The DMCA Violates The First Amendment**

16 The Studios ask this Court to construe the DMCA in a manner that effectively does away
17 with fair use in the digital realm. Such an interpretation is incompatible with the First
18 Amendment's free speech guarantees. Moreover, the Studios ask the Court to rule that this
19 evisceration of fair use survives First Amendment scrutiny—which requires the Court to make
20 determinations regarding the challenged statute's impact on speech, and the extent to which there
21 are other, less intrusive ways to address the government's legitimate interests—on a record bereft
22 of any facts, without even affording 321 the opportunity to take discovery necessary to develop
23 the relevant evidence. The procedural posture of this case is thus unlike *Corley*, in which the
24 court conducted a six-day trial before rendering a final decision, and *Elcom*, in which the court
25 ruled on a motion to dismiss a criminal indictment which, because of the lack of discovery
26 afforded criminal defendants, was of necessity only a broad-brush facial challenge to the statute.

27 321 will show that the DMCA is unconstitutional as applied to the sale of DVD Copy
28 Code in two ways. First, prohibiting the sale of DVD Copy Code tramples on the First

1 Amendment rights of third parties who want to engage in protected expression using that
 2 software. Second, prohibiting the dissemination of DVD Copy Code violates 321's First
 3 Amendment rights, because DVD Copy Code is itself speech. Finally, even if a ban on the sale
 4 of DVD Copy Code could be reconciled with the First Amendment, a ban on all technology that
 5 could be used to circumvent encryption is so overbroad as to be unconstitutional on its face.

6 **1. A Ban on DVD Copy Code Impermissibly Burdens The First Amendment Rights of Users**

7 Would-be purchasers of DVD Copy Code have a First Amendment right to use that code
 8 in order to engage in expressive activities, including the fair use of movies.¹³ See *Ashcroft v.*
9 Free Speech Coalition, 535 U.S. 234 (2002) (First Amendment applies to watching movies).
 10 The origins of the First Amendment lie in the compulsory licensing of printing presses which
 11 effectively eliminated the tools necessary to engage in activities protected by the First
 12 Amendment. See *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 320 (2002). For movies, DVD Copy
 13 Code is the printing press of the digital age.

14 **(i) Users Have A First Amendment Right To Make Fair Use Of
 15 Copyrighted Works**

16 The purchasers of DVDs need access to DVD Copy Code (or software like it) in order to
 17 make fair use of their contents.¹⁴ The Studios, citing *Corley* and *Elcom*, argue that prohibiting
 18 such fair use does not raise First Amendment concerns because "fair use is not constitutionally
 19 based." Motion at 18. But the Supreme Court has since rejected that view in *Eldred v. Ashcroft*,
 20 123 S. Ct. 769 (2003), instead explaining that First Amendment principles are built directly into
 21 copyright law through the doctrine of fair use: "[C]opyright law contains built-in First
 22 Amendment accommodations. . . . [T]he 'fair use' defense allows the public to use not only

23 ¹³ The purveyors of products have standing to assert the constitutional speech rights of those who would
 24 purchase them. See *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972) (distributor of contraceptives can
 25 challenge law banning their distribution to unmarried individuals); *Craig v. Boren*, 429 U.S. 190, 195
 26 (1976) (vendor may challenge statute forbidding sale of 3.2% beer to men—but not women—between the
 27 ages of 18 and 21); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988); *Bursey v. United
 28 States*, 466 F.2d 1059, 1083 (9th Cir. 1972) ("The First Amendment interests in this case are not confined
 to the personal rights of Bursey and Presley. Although their rights do not rest lightly in the balance, far
 weightier than they are the public interests in First Amendment freedoms that stand or fall with the rights
 that these witnesses advance for themselves").

¹⁴ *Universal Studios v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2002) and *Corley* did not consider this
 issue because the defendants had not developed an adequate factual record. Here, by contrast, 321 is

1 facts and ideas contained in a copyrighted work, but also expression itself in certain
2 circumstances.” *Id.* at 788-89 (citations omitted). Thus, the fair use doctrine is the savings
3 clause that renders the copyright laws consistent with the First Amendment. Without the fair use
4 doctrine as a safety valve to prevent “abuse of the copyright owner’s monopoly as an instrument
5 to suppress” facts, ideas, and critical commentary, the copyright laws impermissibly would
6 abridge the freedom of speech. *Harper & Row*, 471 U.S. at 559. To the extent that it restricts
7 fair use in the digital realm, a ban on the sale of DVD Copy Code breaches the constitutional
8 wall between copyright and freedom of expression.

(ii) The DMCA Unduly Burdens The Exercise Of First Amendment Rights

The many fair uses of DVD Copy Code that involve copying CSS-protected DVDs include excerpting clips for scholarship or critical reviews, creating instructional videos, incorporating movie clips into new video works, making backup copies of DVDs, and repairing scratched DVDs. Although the Studios have argued vociferously that fair use is no defense under the DMCA, the Studios doubtless will also argue in response to this argument that the DMCA does not eliminate these fair uses after all. They cannot have it both ways. To the extent that the DMCA bans the tools necessary to engage in fair use, it has eliminated fair use itself. The courts have long rejected such “back door” regulations of speech. See *Denver Area Educ. Telcoms. v. FCC*, 518 U.S. 727, 809-810 (1996) (“few of our First Amendment cases involve outright bans on speech); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-137 (1992) (broad discretion of county administrator to award parade permits and to adjust permit fee according to content of speech violates First Amendment); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67-68 (1963) (informal threats to recommend criminal prosecutions and other pressure tactics by state morality commission against book publishers violate the First Amendment).

²⁴ Nor is there any practical way to make a copy of a DVD without using DVD Copy Code
²⁵ (or other software like it).¹⁵ The Supreme Court recently cautioned that "one is not to have the

27 entitled to take discovery in order to make such a showing.

²⁸ 15 The Studios may contend that fair use is not implicated because all content on DVDs is available in another form, but they have proffered no evidence in support of that contention, and it is false. While

1 exercise of his liberty of expression in appropriate places abridged on the plea that it may be
2 exercised in some other place.” *Reno v. ACLU*, 521 U.S. 844 (1997) (availability of indecent
3 speech on paper did not justify banning it on the internet). Nonetheless, the Studios may argue
4 that it is theoretically possible to purchase (for hundreds of dollars) a video camera, point it at the
5 screen, and videotape the DVD playing on the television (though there is no evidence in the
6 record on this point). But such a financial burden on the exercise of First Amendment rights is
7 equally impermissible. See *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 227-28
8 (1987) (invalidating tax on magazines); *Simon & Schuster, Inc. v. Members of N.Y. State Crime*
9 *Victims Bd.*, 502 U.S. 105, 116 (1991) (invalidating New York’s “Son of Sam” law which made
10 available to victims a criminal’s income from works describing his crime). Moreover, the copy
11 will not be of remotely comparable quality, and will not allow use of the many interactive
12 features of modern DVDs, like the video game included with the *Monsters, Inc.* DVD.

(iii) The DMCA Impairs The First Amendment Right To Access Non-Copyrighted Works

The Studios' effort to preclude any copying of CSS-encrypted content runs afoul of the First Amendment because it places almost unlimited power in the hands of copyright holders to control information, including information that is not even protected by copyright. Some DVDs encrypted with CSS contain material that is in the public domain, either in whole or in part. Moore Decl., ¶¶32-33. The purchaser of a DVD has an unqualified right under the First Amendment to make use of this public domain information. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978). However, under the Studios' reading of the DMCA, because the technological measure *can* be used to protect a copyrighted work, it is illegal to market a product that could circumvent it *even if the product is applied to non-copyrighted works*. There is no governmental interest whatsoever in allowing a distributor to prohibit such copying, and no justification under the First Amendment for doing so.

such an assumption may have been warranted as to eBooks based upon the record presented on the motion to dismiss in *Elcom*, the record here is replete with evidence that some content is available only in CSS encrypted DVDs. Thus, a scholar wanting to comment upon alternative endings to Alfred Hitchcock's *Vertigo*, and wanting to show the examples in question, has no ability to do so under the Studios' reading of the DMCA. Moore Decl., ¶32.

(iv) A Prohibition On DVD Copy Code Is Not Necessary To Advance Any Significant Government Interest

A ban on the sale of DVD Copy Code is not “narrowly tailored to serve a significant governmental interest” and does not “leave open ample alternative channels for communication of the information.” *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Nor does it “eliminate the exact source of the evil it sought to remedy.” *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984). Such a ban “is not ‘narrowly tailored’—even under the more lenient tailoring standards applied in *Ward* and *Renton*—where, as here, ‘a substantial portion of the burden on speech does not serve to advance [the State’s content-neutral] goals.’” (Citations omitted). *Simon & Shuster*, 502 U.S. at 122.¹⁶

In order to determine whether DVD Copy Code can be prohibited consistent with the First Amendment, the Court must evaluate an empirical record and draw “reasonable inferences based on substantial evidence.” *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 666 (1994). In *Turner*, the Supreme Court subjected the must-carry rules of the Cable Act to an exhaustive review, explaining that factual findings concerning the actual effects of the regulations on protected speech were “critical” because “unless we know the extent to which the . . . provisions in fact interfere with protected speech, we cannot say whether they suppress ‘substantially more speech than . . . necessary.’” *Id.* at 668; see also *Reimerdes*, 111 F. Supp. 2d at 333-34 (granting injunction only because no other practical means of preventing infringement through the use of DeCSS).

Here, however, the Studios have put forward no evidence that a ban on DVD Copy Code will advance *any* governmental interest, let alone that such a ban is narrowly tailored. DVD Copy Code is not a tool for pirates. There is no evidence that DVD Copy Code has ever been used for copyright infringement. DVD Copy Code does not allow for the redistribution of movies over the Internet; it burns a physical backup copy of a DVD, and erases the electronic

¹⁶ If the government wants to avoid fraudulent political fundraising, it may bar the fraud, but it may not prohibit legitimate fundraising. See *Schaumburg v. Citizens For Better Env't*, 444 U.S. 620 (1980). If the government wants to avoid littering, it may ban littering, but it may not ban all leafleting. *Schneider v. State*, 308 U.S. 147 (1939). If the government wants to protect homeowners from unwanted solicitation, it may enforce householders "no soliciting" signs, but it may not cut off access to homes whose residents

1 copy from the computer in the process of doing so. Moreover, DeCSS, which lacks the serial
 2 copy protections of DVD X Copy, is still widely available on the Internet.
 3 Not only is there no evidence that a ban on DVD Copy Code will advance any
 4 governmental interest, but it also does not leave open “ample alternative channels” for the fair
 5 use of encrypted, copyrighted DVDs and the copying of non-copyrighted content. Moreover,
 6 there are clear alternatives. The DMCA could incorporate—as we believe it does—principles of
 7 fair use, thus permitting products designed to allow consumers to exercise their First Amendment
 8 rights. Such a regulation would advance the legitimate interests of copyright holders while
 9 minimizing the burden on protected speech. Alternatively, Congress could have elected to make
 10 the penalties for copyright infringement more stringent or to criminalize the use of the Internet to
 11 distribute infringing copies. *See Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) (“[t]he normal
 12 method of deterring unlawful conduct is to impose an appropriate punishment on the person who
 13 engages in it.”) As the Court recently explained, in striking down portions of a wiretap statute,
 14 “[I]f the sanctions that presently attach to a violation of [the law] do not provide sufficient
 15 deterrence, perhaps those sanctions should be made more severe.” *Id.* Indeed, the DMCA itself
 16 adopts this approach in §1201(a)(1) by banning the *use* of circumvention tools to obtain
 17 unauthorized access to a work.¹⁷
 18 Moreover, the Court can and should “take Congress’ different, and significantly less
 19 restrictive, treatment of a highly similar problem as at least as some indication that more
 20

21 are willing to hear what the solicitors have to say. *Martin v. Struthers*, 319 U.S. 141 (1943).

22¹⁷ The Studios began releasing DVDs well before the enactment of the DMCA, presumably relying on the
 23 doctrine of contributory infringement, which affords strong protection for copyright owners. Courts have
 24 uniformly extended contributory infringement liability to those who use dual-purpose devices actively to
 25 participate in acts of infringement, as well as to those who knowingly provide facilities to infringers. *See, e.g., Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996) (flea market operator); *Sega Enters. v. MAPHIA*, 948 F. Supp. 923 (N.D. Cal. 1996) (internet bulletin board operator); *A&M Records, Inc. v. Abdallah*, 948 F. Supp. 1449 (C.D. Cal. 1996) (provider of blank “time-loaded” audiocassettes); *RCA Records v. All-Fast Sys., Inc.*, 594 F. Supp. 335 (S.D.N.Y. 1984) (commercial operator of
 26 audiocassette copying machine). The doctrine of contributory infringement is robust, and well advances
 27 the government’s interest in copyright enforcement. Indeed, contrary to the Studio’s assertions, the
 28 DMCA’s anti-trafficking provisions were not enacted to comply with the WIPO Copyright Treaty
 because the Treaty requires only that the signatory states provide “adequate legal protection and effective
 legal remedies” against the circumvention of technological controls, and such protection was already
 provided by the contributory copyright infringement doctrine. Notably, 321 has sought declaratory relief
 that it is not engaged in contributory copyright infringement, but the Studios have responded that 321’s

1 restrictive means are not essential (or will not prove very helpful).” *Denver Telcons.*, 518 at
 2 757. These less restrictive alternatives include (i) the “burglars’ tools” statutes, which restrict
 3 circumvention liability to those who intentionally aid and abet copyright infringement, (ii) the
 4 Audio Home Recording Act, 17 U.S.C. §1008, which expressly allows purchasers of digital
 5 musical content—including content that is protected by technological measures—to make copies
 6 of the original recording, but not serial copies,¹⁸ and (iii) 17 U.S.C. §1309(b), enacted in
 7 conjunction with the DMCA, which makes a disseminator of information liable only if he or she
 8 “induced or acted in collusion with” one who actually gains unauthorized access to a work.¹⁹
 9 The Studios have come forward with no evidence that any of these approaches are not
 10 adequate to meet the legitimate objective of stemming copyright infringement. Instead, the
 11 Studios have come forward with at best conclusory assertions of harm. But the justification for a
 12 burden on expression must be “far stronger than mere speculation about serious harms,”
 13 *Bartnicki*, 532 U.S. at 532, particularly as applied to a prohibition on the sale of software
 14 intended to facilitate legal copying. The Studios must come forward with *evidence*, and they
 15 have not, let alone the undisputed evidence required to obtain summary judgment. At a
 16 minimum, there is a question of fact regarding the extent to which the DMCA impairs the ability
 17 of users of DVD Copy Code to engage in protected speech, and the extent to which there are
 18 other less restrictive means could meet the Government’s legitimate goals. Cf. *Tattered Cover*,
 19 Inc. v. City of Thornton, 44 P. 3d 1044, 1061 (S. Ct. Colo. 2002) (requiring hearing in order for
 20 court to balance government interest in law enforcement with harms associated with enforcing
 21 search warrant for bookstore’s records).

22 2. **The DMCA Unconstitutionally Restricts 321’s Speech**

23 As interpreted by the Studios, the DMCA also unconstitutionally restricts 321’s First
 24 Amendment right to tell others how to make fair use of copyrighted works.

25
 26
 request for declaratory relief is moot.

27 ¹⁸ *Corley* dismissed the significance of the AHRA because there was no evidence in the record that the
 28 same scheme could be applied to DVDs. But DVD Copy Code is just a program.

19 *Corley* refused to consider these arguments because they had not been presented to the trial court.

(i) The DMCA Regulates Speech On The Basis Of Its Content

[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). “As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based.” *Turner*, 512 at 642-43.²⁰ A regulation is content-based when the only way to determine whether the regulation prohibits speech is to examine the content of the speech. *See Arkansas Writers’ Project*, 481 U.S. at 227-230 (“In order to determine whether a magazine is subject to sales tax, . . . ‘enforcement authorities must necessarily examine the content of the message that is conveyed. . . .’ Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment’s guarantee of freedom of the press”).
(Citation omitted).²¹

²⁰ The *Elcom* court determined that the DMCA is content neutral and thus subject to intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding statute prohibiting destruction of draft cards). The Studios wisely do not advance this argument. In *O'Brien*, the Court rejected the plaintiff's claim that his burning of his draft card was protected under the First Amendment because he had intended to convey an anti-war message. The Court explained that the statute condemned only the "independent non-communicative" aspect of *O'Brien's* conduct, and that this aspect of his conduct frustrated a legitimate governmental objective. *Id.* at 382. (The governmental purpose would be frustrated equally if *O'Brien* burned his draft card to make a point or to light a cigarette). The Court thus concluded that "[i]f the case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises on some measure because the communication allegedly integral to the conduct is itself thought to be harmful." *Id.* *O'Brien* is inappropriate for three reasons. First, *O'Brien* applies only where speech and non-speech elements are combined in a single course of conduct; it does not apply to regulations of pure speech. All the parties here agree that the DMCA applies to software ("technology") as well as hardware, and that software is speech. Because the DMCA directly regulates speech, not merely conduct, *O'Brien* does not apply. See *id.* at 376. Second, to the extent that the DMCA bans the sale of DVD Copy Code, it does so because the communication of those programs "is itself thought to be harmful"; because the content of the code (circumvention) frustrates a governmental purpose. See *id.* at 382. Third, in *O'Brien*, the court did not need to examine the nature of the expression being conveyed by *O'Brien's* conduct in order to determine that the conduct was prohibited. See *id.*; Compare *Texas v. Johnson*, 491 U.S. 397, 404-05 (1989) (striking down statute prohibiting flag burning because prohibition on flag-burning depended upon message being communicated). Under the DMCA, however, the Court must examine the content of code in order to determine whether it is prohibited. For each of these reasons, the DMCA cannot be subjected to intermediate scrutiny under *O'Brien*. Instead, the better analogy is to *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988), in which Falwell brought a claim under the "generally applicable" tort of intentional infliction of emotional distress. The Court held that where the alleged tort was speech, no liability could attach without a showing that the publication contained a false statement of fact made with actual malice. See also *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 577-78 (1995) (general anti-discrimination laws require strict scrutiny when applied to a parade).

²¹ A content-based regulation cannot be saved by invoking a supposedly content-neutral purpose. The

According to the Studios, the DMCA suppresses speech that indicates how to circumvent a technological measure protecting a copyright. That regulation cannot even be articulated without reference to the content of the speech that is banned. If DVD Copy Code helped bolster encryption technology, the DMCA would not apply. It is only by referring to the content of the speech that it is possible to tell whether that speech is licit or illicit under the DMCA. Because the DMCA discriminates against certain speech based upon its content, the DMCA is a content-based restriction.

(ii) Computer Code Is Speech Protected By The First Amendment

The DMCA targets both speech in the English language, and speech in the form of computer code. For example, DVD Copy Plus is essentially an instruction manual that explains how to use certain programs that are freely available on the Internet, while DVD X Copy is a computer program, but the Studios treat them the same way, conceding, as they must, that computer code is speech that is fully protected by the First Amendment. *See Corley*, 273 F.3d at 447; *Karn v. U.S. Dep't of State*, 925 F. Supp. 1, 9-11 (D.D.C. 1996); *Elcom*, 203 F. Supp. 2d at 1126-27; *Junger v. Daley*, 28 Media L. Rep. (BNA) 1609 (6th Cir. 2000).²² As the *Reimerdes* court concluded:

17 It cannot seriously be argued that any form of computer code may be regulated
18 without reference to First Amendment doctrine. The path from idea to human
language to source code to object code is a continuum. As one moves from one to
the other, the levels of precision and, arguably, abstraction increase, as does the

Supreme Court has long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment. *See Turner*, 512 U.S. at 642-43. Thus "while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content-based, it is not necessary to such a showing in all cases. . . . Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." *Id.*; see also, *Simon & Schuster*, 502 U.S. at 117 ("illicit legislative intent is not the *sine qua non* of a violation of the First Amendment"); *Regan v. Time*, 468 U.S. 641, 648-59 (1984) (exceptions in a general anti-counterfeiting statute), *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 514-15 (1981) (general urban beautification ordinance), *Carey v. Brown*, 447 U.S. 455, 466-68 (1984) (ordinance aimed at preserving residential privacy). A statute barring the advocacy of communism may have the content-neutral goal of preventing the overthrow of the government, but that does not render the statute content-neutral.

²² Source code and object code are the languages used by humans to express ideas in forms understandable to and usable by computers. Touretzky Decl., ¶¶31-35. Most programmers write in source code languages, which involve a series of letters and symbols, with specific vocabulary, syntax and expository conventions. *Id.* Object code has a simpler structure: a sequence of instructions, each of which is a sequence of fields, each of which has a fixed size. *Id.* Both source code and object code can be read and understood by programmers (albeit with varying degrees of difficulty) and both are expressive languages. *Id.*

1 level of training necessary to discern the idea from the expression. Not everyone
 2 can understand each of these forms. Only English speakers will understand
 3 English formulations. Principally those familiar with the particular programming
 4 language will understand the source code expression. And only a relatively small
 number of skilled programmers and computer scientists will understand the
 machine readable object code. But each form expresses the same idea, albeit in
 different ways.

5 111 F. Supp. 2d at 326. Moreover, as Judge Patel explained, “[w]hether source code and object
 6 code are functional is immaterial to the analysis at this stage. Contrary to defendants' suggestion,
 7 *the functionality of a language does not make it any less like speech.*” *Bernstein v. United States*
 8 *Department of State*, 922 F. Supp. 1426, 1435 (N.D. Cal. 1996) (emphasis added) (export
 9 regulations prohibiting the dissemination of encryption software violated the First Amendment).
 10 Thus, “even if source code, which is easily compiled into object code for the computer to read
 11 and easily used for encryption, is essentially functional that does not remove it from the realm of
 12 speech.” *Id.*

13 (iii) **The DMCA Regulates Both Function And Expression**

14 The Studios argue that the DMCA is content-neutral because the DMCA targets the
 15 “functional” aspect of DVD Copy Code, citing *Corley* and *Elcom*, both of which correctly
 16 concluded that object code is speech and thus subject to First Amendment scrutiny. However,
 17 *Corley* also concluded that the DMCA prohibited DeCSS “on the basis of the functional
 18 capability of DeCSS to instruct a computer to decrypt CSS, i.e., ‘without reference to the content
 19 of the regulated speech.’” *Corley*, 273 F.3d at 454. The *Elcom* court similarly concluded that
 20 “to the extent that the DMCA targets computer code, Congress sought to ban the code not
 21 because of what the code says, but rather because of what the code does.” 203 F. Supp. 2d at
 22 1128.

23 (a) **Computer Code Can Be Either Functional Or Expressive**

24 Words in any language—English or object code—*can* be functional. One would not
 25 defend an action for breach of oral contract by invoking the First Amendment. The same is true
 26 of words that constitute sexual harassment, unlawful termination, or fraud. Nor could a hacker
 27 defend an action for unauthorized access to a secure website on the ground that he was engaged
 28 in protected speech because he was merely typing letters and numbers on a keyboard.

1 The fact that words *can* be functional, however, does not mean that they are always so.
 2 Two persons exchanging marriage vows could be changing their legal status, acting in a play, or
 3 engaging in political protest (if they are of the same sex and not in Vermont). As with words
 4 spoken in the English language, whether computer code is functional can only be determined in
 5 context. In the case of code, the inquiry turns substantially on to whom (or to what) the code is
 6 transmitted. When one person transmits computer code to another person, there is nothing
 7 inherently functional about that transmission, any more than there is anything inherently
 8 functional in transmitting a recipe or an instruction manual over the Internet. See *Bernstein*, 922
 9 F. Supp. at 1435 (“Instructions, do-it-yourself manuals, [and] recipes” are all “speech”); *Winter*
 10 *v. G.P. Putnam & Sons*, 938 F.2d 1033 (9th Cir. 1991) (instructional guide on the collection and
 11 cooking of mushrooms protected under the First Amendment). Once either DVD Copy Plus or
 12 DVD X Copy is transmitted, it simply resides on the recipient’s computer. Nothing happens
 13 from the mere fact of transmission. The recipient may study it, delete it, use it, or do nothing
 14 with it at all.

15 Computer code does not perform any function until a person transmits that code to a
 16 computer, just like an instruction manual does nothing until a user follows its instructions.²³
 17 Only at that point does code “do” anything, and thus only at that point does it become
 18 “functional.”²⁴ Thus, a prohibition on the *use* of computer code is not a direct regulation of
 19 speech, even though it involves the transmission of 0s and 1s. But the regulation of the
 20 transmission of that code from one person to another, independent of its use, is a regulation of
 21 speech, not function.

22 (b) **DVD Copy Code Cannot Be Regulated On The Basis Of Its Potential
 23 Consequences**

24 ²³ This is why computer viruses can be regulated, although they are written in code: once sent to their
 victim, they require no human intervention in order to work.

25 ²⁴ At a minimum, the extent to which object code is functional or expressive or both cannot be resolved
 26 adversely to 321 on summary judgment, particularly when the Studios have put forward no evidence on
 27 the issue. In this dynamic area, where technology changes rapidly, drawing legal lines in the sand is,
 28 at best, a risky venture. *See Denver Telcoms.*, 518 U.S. at 768 (Stevens, J., concurring) (“[I]t would be
 unwise to take a categorical approach to the resolution of novel First Amendment questions arising in an
 industry as dynamic as this”). *Compare Mutual Film Corp. v. Industrial Com. of Ohio*, 236 U.S. 230,
 243-45 (1915) (movies are not entitled to First Amendment protection) with *Joseph Burstyn, Inc. v.
 Wilson*, 343 U.S. 495, 501 (1952) (movies are entitled to First Amendment protection).

1 The gist of *Corley* and *Elcom*'s analysis is that Congress can regulate DVD Copy Code
 2 because the government's real target is the potential consequences of DVD Copy Code. There
 3 are two problems with that reasoning. First, DVD Copy Code does not lead inexorably to
 4 copyright infringement. To the contrary, its principal and intended uses—and the only uses of
 5 which there is any evidence in the record—are perfectly legal. Second, the Supreme Court has
 6 held that, other than in very narrow circumstances, the consequences that *potentially* flow from
 7 speech cannot be used to justify a lower level of scrutiny. *Forsyth County v. Nationalist
 8 Movement*, 505 U.S. 123, 134 (1992) (listeners "reaction to speech is not a content-neutral basis
 9 for regulation"). As the Supreme Court explained in *Bartnicki*, "it would be quite remarkable to
 10 hold that speech by a law-abiding possessor of information can be suppressed in order to deter
 11 conduct by a non-law-abiding third party." *Bartnicki*, 532 U.S. at 529-30 (invalidating as
 12 unconstitutional under the First Amendment a law that prohibited the dissemination of
 13 intercepted private conversations). Indeed, as explained in *American Booksellers Assoc. v.
 14 Hudnut*, 771 F.2d 323, 333 (7th Cir. 1985):

15 Much speech is dangerous. Chemists whose work might help someone build a
 16 bomb, political theorists whose papers might start political movements that lead to
 17 riots, speakers whose ideas attract violent protesters, all these and more leave loss
 18 in their wake. Unless the remedy is very closely confined, it could be more
 19 dangerous to speech than all the libel judgments in history.
 20 Where a regulation is justified based upon the likely of a listener in response to the speech, the
 21 prohibited speech must be so inflammatory that it renders the listeners unable to control
 22 themselves. *See, e.g., United States v. Poocha*, 259 F.3d 1077 (9th Cir. 2001); *Houston v. Hill*,
 23 482 U.S. 451, 462 (1987). *Cf. Waller v. Osbourne*, 763 F. Supp. 1144, 1151 (M.D. Ga. 1991)
 24 (sustaining demurrer to complaint alleging Ozzie Osbourne's songs cause plaintiff's son to shoot
 25 himself); *McCollum v. CBS, Inc.*, 202 Cal. App. 3d 989 (1988) (same).

26 Neither *Corley* nor *Elcom* cited or discussed these cases, or the principles they embody,
 27 instead concluding that the human intervention required to turn a computer program into
 28 "function" is so slight that it should be disregarded. *Corley* tried to justify this slippage on the
 ground that "the causal link between the dissemination of circumvention computer programs and
 their improper use is more than sufficiently close to warrant selection of a level of constitutional

1 scrutiny based on the programs' functionality." *Id.* at 452. In other words, *Corley* was
 2 concerned that the Internet makes it too easy to push a button and transform speech into conduct.
 3 But there is no "internet exception" for the application of the First Amendment, and *Corley*
 4 provided no authority for that conclusion other than *Red Lion Broadcasting Co. v. FCC*, 395
 5 U.S. 367, 386 (1969), which it cited for the proposition that "the characteristics of new media
 6 justify differences in the First Amendment standards applied to them." *Id.* The Supreme Court
 7 rejected precisely this analogy in *Reno*, 521 U.S. at 868-69, distinguishing *Red Lion* and other
 8 cases pertaining to the FCC's regulation of radio and television, and concluding that "our cases
 9 provide no basis for qualifying the level of First Amendment scrutiny that should be applied to
 10 [the internet]." *Id.* at 870.²⁵

11 Under the relevant cases, what matters is not the ease with which the listener could take
 12 action but rather whether the listener could reasonably be expected to exercise restraint in light
 13 of the nature of the speech. *See, e.g., NAACP v. Claiborne Hardware, Co.*, 458 U.S. 886
 14 (1982).²⁶ In other words, if a mob is so aroused that it could be considered a gun, a speaker can
 15 be held liable for pulling the trigger. Here, there is no mob, and there is no trigger. Any
 16 potential user can sit at home and contemplate his actions at his leisure. There is at a minimum a
 17 disputed issue of fact as to whether the availability of a program such as DVD-X-Copy will
 18 overbear the will of the citizenry and turn them into a lawless mob. Under the First Amendment,
 19 that is a question that this Court must decide based on facts, not merely assumptions, and thus
 20 cannot resolve on summary judgment.

21
 22 ²⁵ The *Elcom* court cited only one case (other than *Corley*) in support of the proposition that it is possible
 23 to divorce the function of computer code from its message: *Connectix*, 203 F.3d at 602-03. *Connectix* has
 24 no relevance here; it holds that, because copyright protects only the form in which ideas are expressed,
 25 not the ideas that are being expressed, copyrighted software contains both copyrighted elements and non-
 26 copyrighted elements. But the First Amendment, unlike the Copyright Act, is not concerned only with
 27 form over substance; it is as concerned with the free dissemination of the ideas themselves as it is with the
 28 words or symbols in which those ideas are expressed.

26 ²⁶ Some cases recognize an exception for speech that amounts to aiding and abetting a crime. *See Rice v. The Palladin Enter's.*, 128 F.3d 233, 247 (4th Cir. 1997) (liability for publishing book on how to be a hit
 27 man with knowledge and intent that the book would be used to facilitate criminal activity). But here, 321
 28 neither advocates nor encourages lawless action, and indeed has taken steps to ensure that its products are
 not used for illegal ends, nor have the Studios proffered any evidence that anyone has used DVD Copy
 Code for an illegal purpose.

(iv) A Ban on DVD Copy Code Cannot Survive Strict Scrutiny

2 “Content-based speech restrictions are generally unconstitutional unless they are
3 narrowly tailored to a compelling state interest. This is an exacting test. It is not enough that the
4 goals of the law be legitimate, or reasonable, or even praiseworthy. There must be some
5 pressing public necessity, some essential value that has to be preserved; and even then the law
6 must restrict as little speech as possible to serve the goal.” *Turner*, 512 U.S. at 680. “Broad
7 prophylactic rules in the area of free expression are suspect. Precision of regulation must be the
8 touchstone. . . .” *NAACP v. Button*, 371 U.S. 415, 438 (1963) (citations omitted). Although the
9 Government may have a legitimate interest in preventing widespread digital piracy, “[t]he First
10 Amendment as we understand it today rests on the premise that it is government power, rather
11 than private power, that is the main threat to free expression, and, as a consequence, the
12 Amendment imposes substantial limitations on the Government even when it is trying to serve
13 concededly praiseworthy goals.” *Turner*, 512 U.S. at 685.²⁷

Moreover, even to the extent that DVD Code is deemed functional, not expressive, the Supreme Court has applied a stringent standard. For example, in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), the Supreme Court invalidated a sign ban even though signs posted on houses or front lawns involved the “functional” creation of “visual blight and clutter,” because the functional aspect of the regulation was inseparable from the expression of ideas. *Id.* at 47. In the context of charitable solicitation, which involves the “functional” exchange of money as well as support for ideas, the Supreme Court has consistently “refused to separate the component parts of charitable solicitations from the fully protected whole.” *Riley v. National Fed'n of the Blind, Inc.*, 487 U.S. 781, 796 (1988); see also *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (solicitation is “characteristically intertwined with informative and perhaps persuasive speech . . . [and] without solicitation the flow of such information and advocacy

²⁷ The Court must evaluate not only the importance of the asserted interest but also the realistic scope of the threat: although Jack Valenti still cries that "we are in the midst of the possibility of Armageddon," and cites as evidence that millions attempted to download copies of the movies *Spiderman* and *Star Wars: Episode II* before they were released, thus undercutting box office sales, those two movies were the fastest ever to reach \$100 million in box office receipts, and combined for a whopping \$715 million in box office sales in 2002. *Washington Times*, Jan. 24, 2003, p. A22.

1 would likely cease"). And "where . . . the component parts of a single speech are inextricably
 2 intertwined," the Court has held, "we cannot parcel out the speech, applying one test to one
 3 phrase and another test to another phrase. Such an endeavor would be both artificial and
 4 impractical." *Riley*, 487 U.S. at 796.²⁸

5 A ban on the sale of DVD Copy Code does not advance any compelling government
 6 interest, and certainly is not the least restrictive means of doing so. The Studios have come
 7 forward with no evidence that DVD Copy Code has ever been used to engage in piracy. Indeed,
 8 it has built-in protections to guard against such piracy; even the Studios concede that DVD-X-
 9 copy cannot be used to make multiple serial copies of a DVD. To the extent that the DMCA
 10 restricts the sale of DVD Copy Code, the DMCA does not "restrict as little speech as possible to
 11 serve the [government's legitimate] goal."

12 **3. The DMCA Is Substantially Overbroad**

13 Even if a prohibition on the sale of DVD Copy Code could survive First Amendment
 14 scrutiny, the DMCA cannot survive a broader challenge to its many other applications. "Where
 15 the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute
 16 will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack."
 17 *Taxpayers for Vincent*, 466 U.S. at 801 n.19. The overbreadth doctrine applies where the
 18 movant's own speech is not implicated (or the movant's speech can permissibly be regulated),
 19 but the movant can "demonstrate a substantial risk that application of the provision will lead to
 20 the suppression of speech" on the part of others. *National Endowment for the Arts v. Finley*, 524
 21 U.S. 569, 580 (1998).²⁹

22 A litigant can bring a facial challenge on behalf of third parties if the statute is
 23 "substantially overbroad." See *Secretary of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947,

24 _____
 25 ²⁸ For all the reasons set forth herein a ban on DVD Copy Code also cannot withstand even intermediate
 26 scrutiny.

27 ²⁹ A party may make a facial challenge to a statute if the statute seeks to regulate either speech or
 28 "patently 'expressive or communicative conduct.'" *Roulette v. City of Seattle*, 97 F.3d 300, 303 (9th Cir.
 1996). The DMCA is susceptible to a facial challenge because it regulates software, which the Studios
 have conceded is speech. Moreover, the effect of the DMCA is overwhelmingly on speech. The name of
 the statute is the "Digital" Millennium Copyright Act and, as even *Elcom* recognized "in the digital age,
 more and more conduct occurs through the use of computers and over the internet." *Elcom*, 203 F. Supp.

1 959 (1984) “Litigants . . . are permitted to challenge a statute not because their own rights of
 2 free expression are violated, but because of a judicial prediction or assumption that the statute’s
 3 very existence may cause others not before the court to refrain from constitutionally protected
 4 speech or expression.” *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Here, the DMCA
 5 poses a substantial risk that speech regarding the legitimate study and advancement of encryption
 6 and computer technology will be prohibited, as set forth in detail in the Declaration of Professor
 7 Felton. Again, this is necessarily a factual question, and one upon which 321 has the right to
 8 take discovery.

9 C. **The DMCA Exceeds The Scope Of Congressional Powers**

10 Congress may legislate only pursuant to a power enumerated in the Constitution. Neither
 11 the text nor the legislative history of the DMCA indicates which power Congress relied on, but
 12 the DMCA’s anti-device provisions are not a valid exercise of any of Congress’ enumerated
 13 powers. They prohibit devices without regard for originality, duration of copyright, or
 14 infringement of copyright in the underlying, technologically protected work; therefore, they are
 15 not a valid exercise of the intellectual property power. Nor are they a lawful exercise of the
 16 necessary and proper power or the commerce power, because they contravene specific limits on
 17 Congress’ power under the Intellectual Property Clause.

18 1. **The DMCA Cannot Be Sustained Under The Intellectual Property Clause**

19 The Intellectual Property Clause “is both a grant of power and a limitation.” *Graham v.*
 20 *John Deere Co.*, 383 U.S. 1, 5 (1966). The Intellectual Property Clause authorizes Congress
 21 only to grant exclusive rights in “[w]ritings” and “[d]iscoveries,” and only for “limited [t]imes.”
 22 U.S. Const. Art. I, § 8, cl. 8; *Trade-Mark Cases*, 100 U.S. 82, 93-94 (1879). A law that protects
 23 informational goods without regard for these limitation` cannot claim the Intellectual Property
 24 Clause as its authority. *Trade-Mark Cases*, 100 U.S. at 93-94 (holding that Intellectual Property
 25 Clause could not authorize law protecting trademarks regardless of “novelty, invention,
 26 discovery, or any work of the brain” or of “fancy or imagination”).³⁰

27
 28 at 1128.

³⁰ The Copyright Clause requires that copyright be limited in both scope and effect. See *Feist*

1 Congress' constitutional authority to remedy state violations of the Fourteenth Amendment using
 2 "appropriate legislation")
 3 The principle of limited protection requires that copyright not confer the exclusive right
 4 to control all uses of a work. The Copyright Act scrupulously preserves fair use and other
 5 doctrines that limit attempts to control personal use of lawfully acquired copies of works. *See,*
 6 *e.g.*, 17 U.S.C. §§ 102(b) (idea-expression distinction), 107 (fair use), 109(a) (first sale). The
 7 DMCA destroys the Intellectual Property Clause's carefully crafted balance. First, the
 8 provisions effectively nullify the public's ability to make fair use of the underlying copyrighted
 9 works. Second, the DMCA effectively nullifies the public's ability to access, use and copy
 10 public domain material, including copyright-expired material, whenever they are shielded by
 11 technological protection systems. The *Corley* court characterized this argument as "premature
 12 and speculative" absent evidence that a copyright owner actually had applied a technological
 13 measure to prevent copying from the public domain. *Corley*, 273 F.3d at 445. But Congress'
 14 authority to enact a law cannot depend upon the subsequent conduct of the law's beneficiaries,
 15 and, in any event, 321 has adduced just such evidence and must be afforded the opportunity to
 16 develop additional evidence through discovery.

17 It is no answer to these problems to say that this result is what Congress intended.
 18 *Corley*, 273 F.3d at 443-44 & n. 13. That option was not open to Congress. Nor is it an answer
 19 to say that copyright infringement is an "epidemic" that warrants drastic intervention, *Reimerdes*,
 20 111 F. Supp. 2d at 331-32; Congress is not free to choose a cure that would kill the patient.
 21 Because the DMCA abrogates clear, specific limits on Congress' intellectual property power,
 22 they may not stand as an exercise of Congress' power under the Necessary and Proper Clause.
 23 To so hold would be to conclude that Congress may effectively amend the Constitution to
 24 remove restrictions with which it disagrees. The Constitution dictates otherwise.

25 **3. The DMCA Cannot Be Sustained Under The Commerce Clause**

26 Congress may have intended the anti-device provisions as an exercise of the commerce
 27 power. But Congress may not rely on the commerce power to enact legislation that overrides
 28 other, more specific constitutional constraints. Thus, in *Railway Labor Executives' Ass'n v.*

1 *Gibbons*, 455 U.S. 457 (1982), the Supreme Court reasoned that Congress could not invoke the
 2 commerce power to enact bankruptcy legislation that violated the Bankruptcy Clause's
 3 uniformity requirement. *Id.* at 468-69 ("If we were to hold that Congress had the power to enact
 4 nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the
 5 Constitution a limitation on the power of Congress to enact bankruptcy laws"). Thus, Congress
 6 may not invoke the Commerce Clause to extend exclusive protection to public domain or
 7 copyright-expired subject matter, or to eliminate fair use of copyrighted expression, any more
 8 than it may invoke the Necessary and Proper Clause to do so. *See* Julie E. Cohen, *Copyright and*
 9 *the Jurisprudence of Self-Help*, 13 Berkeley Tech. L.J. 1089, 1131-32 (1998); William Patry,
 10 *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional*
 11 *Collision*, 67 Geo. Wash. L. Rev. 359 (1999).³¹

12 **D. The Studios' Claims Under The DMCA Are Barred By Misuse**

13 The exercise of rights in intellectual property is limited by the equitable doctrine of
 14 misuse. Misuse has typically been found where a defendant can show some attempt by the
 15 owner of intellectual property to obtain more than was intended by its grant, or to restrain trade
 16 in ways beyond the intended scope of the intellectual property right. *See, generally*, *Chisum*
 17 §19.04; *Brulotte v. Thys Co.*, 379 U.S. 29 (1964) (patent misuse).

18 Although the misuse doctrine had its origins in patent law, it is a judge-made doctrine,
 19 and has been expanded into the realm of intellectual property more generally. *See Lasercomb*
 20 *America, Inc. v. Reynolds*, 911 F.2d 970, 976 (9th Cir. 1990) (license attempting to prevent
 21 licensees from independently developing a competing product was copyright misuse); *Practice*
 22 *Mgmt. Info. Corp. v. AMA*, 121 F.3d 516, 520 (9th Cir. 1997) (AMA engaged in copyright misuse
 23 by licensing code to agency in exchange for agreement not to use competing code system);

24 ³¹ In *United States v. Moghadam*, 175 F.3d 1269, 1275-76 (11th Cir. 2000), the Court acknowledged that a
 25 law enacted pursuant to the commerce power cannot survive review if it is "fundamentally inconsistent"
 26 with the Intellectual Property Clause, but concluded that the anti-bootlegging legislation challenged by
 27 the defendant did not create such a conflict as applied to that defendant. 321 does not challenge the anti-
 28 bootlegging laws, and does not allege a conflict with the Intellectual Property Clause's fixation
 requirement. Instead, more relevant to our purposes, the *Moghadam* court expressly suggested that a
 different challenge to the anti-bootlegging statute, based on its grant of perpetual protection to live
 musical performances, would likely succeed. *Id.* at 1281. That is the essential nature of the challenge

1 *Alcatel USA Inc. v. DGI Tech., Inc.*, 166 F.3d 772 (5th Cir. 1999) (copyright misuse found where
 2 license limited use of operating system to hardware produced by copyright owner); *Union*
 3 *Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366 (7th Cir. 1976) (trademark misuse). The
 4 consistent theme of the cases is a refusal to reward private extension of intellectual property
 5 rights contrary to public policy.

6 *Alcatel* is particularly instructive. There, the copyright plaintiff made telephone
 7 switching systems which were controlled by its copyrighted software. The plaintiff licensed its
 8 software to be used only in conjunction with its own manufactured hardware, thus effectively
 9 leveraging its monopoly from software into hardware. The appellate court held that this
 10 licensing scheme was copyright misuse, because public policy forbids “the use of the copyright
 11 to secure an exclusive right or limited monopoly not granted by the Copyright Office. . . .”
 12 *Alcatel*, 166 F.3d at 793.

13 The Studios have used their control of CSS to force customers who purchase DVDs to
 14 use only particular DVD players.³² The Studios’ licensing scheme is entirely circular. The
 15 Studios license CSS to encrypt movies on DVDs; then the Studios license the keys to developers
 16 only if they sign an onerous license agreement with strict confidentiality and trade secret
 17 provisions, imposing regional encoding and other restrictions. Section 1201, as interpreted by
 18 the Studios, then closes the circle by preventing the development of competing players without
 19 the CSS license.

20 This system of licenses allows the Studios to dictate the features of DVD players,
 21 notwithstanding that the DMCA expressly provides that §1201 not be used to require

22
 here.

23 ³² The lawsuits brought to date under the DMCA reflect the misuse of its provisions. One of the most
 24 notorious has been the attempt by Sony to suppress distribution of software tools for the programmable
 25 “Aibo” robot dog. Sony, which offers a suite of such products for sale, sent a demand letter to a website
 26 offering different software tools, claiming that the tools were a DMCA violation as they could permit
 27 owners of an Aibo robot to circumvent technical protections on the Aibo software. See Farhad Manjoo,
 28 *Aibo Owners Biting Mad at Sony*, Wired News, Nov 2, 2001, www.wired.com/news/business/0,1367,48088,00.html;
 David Labrador, *Teaching Robot Dogs New Tricks*, Scientific American, Jan. 21, 2002. Indeed, virtually
 none of the enforcement activities under the DMCA have reflected any effort to stem piracy; instead, the
 theme of the cases is that the DMCA is a weapon to exclude competition. See, e.g., *Lexmark Int’l Inc. v.*
Static Control Components, Case No. 02-571-KSF (E.D. Ky 2002) (suing under DMCA to prevent
 manufacture of compatible toner cartridges).

1 manufacturers to comply with Studio requirements. See §1201(c)(3). The Studios have thus
 2 leveraged their control over the copying of copyrighted work in order to control unlicensed
 3 players, much like the defendant in *Alcatel* used a copyright in order to control hardware. The
 4 Studios have also exploited this scheme to control access to non-copyrighted work and the ability
 5 to engage in fair use. Indeed, the Studios take the position that it is illegal under the DMCA to
 6 use DVD Copy Code in order to circumvent CSS protection for *any* purpose, including making
 7 clips for scholarship, criticism, parody, and education.³³ Moreover, they require customers who
 8 scratch a disk, or experience degradation, to purchase a replacement copy at full cost. Farnham
 9 Decl., Exh. A. (Dowden, Hutto, Keating, McLaughlin, Rivera, Schoene, Sparkman, Thibodeaux,
 10 et al. The Studios have also used their encryption technologies to place “region coding” on
 11 DVDs, prohibiting a DVD sold in Thailand from being played in the United States, and thus
 12 allowing the Studios to engage in price discrimination, selling DVDs more cheaply in some
 13 countries than in others.

14 If the Studios are found to have engaged in misuse, the remedy is that the intellectual
 15 property rights that they have misused are rendered unenforceable. *Morton Salt Co. v. G. S.*
 16 *Suppiger Co.*, 314 U.S. 488, 493 (1942); *Alcatel*, 166 F.3d at 793 (refusing to enforce copyright
 17 due to misuse even where defendant guilty of copyright infringement and unclean hands). 321 is
 18 entitled to develop the facts to show that the Studios are misusing their right to prevent the
 19 unlawful circumvention of CSS under the DMCA by seeking to suppress DVD Copy Code, thus
 20 prohibiting the fair use of copyrighted material and the free use of information in the public
 21 domain, and are thus precluded from enforcing any rights to prevent the circumvention of CSS
 22 under the DMCA.

23 **E. The Studios Cannot Establish A Claim Under The DMCA Because They Have Not
 24 Demonstrated Any Injury**

25 Section 1203(a) provides that only those persons *injured* by a violation can seek redress
 26 under the DMCA. But the Studios have adduced no evidence, let alone undisputed evidence,
 27 that they have suffered, or are likely to suffer, any economic injury as a result of the distribution

28 ³³ Farnham Decl., ¶6 (citing Marta Grutka of MPAA).

1 of 321's product. Indeed, the Burke Declaration explains that it is equally, if not more, likely
 2 that the availability of DVD Copy Code will result in a net economic benefit to the Studios. The
 3 Studios' motion for partial summary judgment or adjudication on its cross-claims under the
 4 DMCA must fail for this additional reason.

5 **F. The Studios Are Not Entitled to Injunctive Relief**

6 In a conclusory paragraph at the end of its brief, the Studios ask the Court for broad
 7 injunctive relief preventing all further sale of the 321 Copy Code and the destruction of all copies
 8 of the software and the retrieval of products already sold to retail outlets. Proposed Order ¶ 5. It
 9 is a "fundamental principle that an injunction is an equitable remedy that does not issue as of
 10 course." *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987). The DMCA does not alter the
 11 equitable nature of the relief sought, and therefore courts must apply the traditional standard for
 12 injunctive relief. *Id.* at 540-41 (absent clear congressional intent, courts must apply principles of
 13 equity in issuing permanent injunctions). The party seeking relief must prove (1) the lack of an
 14 adequate remedy at law, and (2) irreparable harm absent the injunction. *Easyrider Freedom*
 15 *F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1495-96 (9th Cir. 1996). The court must then evaluate
 16 whether there is a *factual basis* justifying the relief. *See Walters v. Reno*, 145 F.3d 1032, 1046-
 17 47 (9th Cir. 1998).³⁴ Because the Studios have not made any such factual showing, and have not
 18 proven and cannot prove irreparable harm, they are not entitled to equitable relief and their
 19 request for a permanent injunction must be denied.

20 **IV. CONCLUSION**

21 For the foregoing reasons, 321 requests that the Studios' motion for summary
 22 adjudication be denied.

23

24 ³⁴ The Studios are not entitled to an injunction under the standards or presumptions that apply to copyright
 25 infringement actions, because the Studios have not alleged that 321 or its customers have engaged in any
 26 copyright infringement. First, the Studios have not presented any evidence of infringement by any party.
 27 Second, the evidence shows that the primary use of 321 Copy Code is for fair use purposes. Moore Decl.,
 28 ¶20. Finally, the Studios have not made a claim for copyright infringement against 321 in this action and
 have asked that 321's declaratory relief claim on this issue be dismissed. *See Answer and Counterclaim*
 at 20. In *Reimerdes*, the court did not consider the injunction under the presumptions that apply in
 copyright infringement actions, instead considering an injunction based on the factual showing at trial and
 the equities presented by the case. 111 F. Supp. 2d at 343-44.

1 DATED: February 21, 2003 KEKER & VAN NEST, LLP
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321 Studios' MPAs In Opposition To Defendants' Motion For Summary Judgment
Case No. C 02-1955 SI

